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No. 88-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PINNEY DOCK & TRANSPORT CO.,
Petitioner,

v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

LITTON INDUSTRIES, INC., *et al.*,
Petitioners,

v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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July 11, 1988

QUESTIONS PRESENTED

1. Whether, as the court of appeals held (in conflict with the District of Columbia Circuit's decision in the criminal case against respondents for the same conduct), the participants in a conspiracy to eliminate direct competitors are immune from antitrust accountability in the federal courts because they are regulated by a federal administrative agency.

2. Whether *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), which bars certain antitrust damage actions by shippers, should be extended for the first time, as the court of appeals held (in conflict with the decisions of three other courts of appeals), to bar antitrust claims by competitors.

3. Whether the court of appeals exceeded its prescribed jurisdiction (a) by permitting respondents to challenge the standing of a plaintiff for the first time on interlocutory appeal under 28 U.S.C. 1292(b) (in conflict with this Court's decision in *United States v. Stanley*, 107 S. Ct. 3054 (1987)), and (b) by ignoring the applicable abuse of discretion standard for reviewing an interlocutory order denying summary judgment, substituting itself as factfinder, and, on the basis of an incomplete record, drawing its own conclusion that summary judgment is warranted.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, Litton Systems, Inc., Litton Great Lakes Corporation, and Erie Marine, Inc. are petitioners, and Bessemer & Lake Erie Railroad Company, Chesapeake & Ohio Railway Company, Baltimore & Ohio Railroad Company, Chessie System, Inc., and CSX Corporation are respondents.*

* The Penn Central Corporation was dismissed as a defendant in the district court and was not a party to the interlocutory appeal before the Sixth Circuit. Pursuant to Fed. R. App. P. 42(b), the Chesapeake & Ohio Railway Company, Baltimore & Ohio Railroad Company, and CSX Corporation were dismissed from the appeal in the *Pinney* case on June 5, 1985 (see Pet. App. 3a n.1).

Pursuant to Supreme Court Rule 28.1, petitioners state the following: Petitioner Pinney Dock & Transport Company is owned in part by the Standard Slag Corporation. Petitioners Litton Systems, Inc., Litton Great Lakes Corporation, and Erie Marine, Inc. are wholly-owned subsidiaries of Petitioner Litton Industries, Inc.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-76a) is reported at 838 F.2d 1445. The opinions of the district court in the *Pinney* case (Pet. App. 81a-129a, 131a-200a, 201a-242a) are reported at 600 F. Supp. 859, 600 F. Supp. 886, and 1983-2 Trade Cas. (CCH) ¶ 65,608. The opinions of the district court in the *Litton* case (Pet. App. 257a-310a, 311a-13a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1988 (Pet. App. 77a-78a). The petition for rehearing was denied on April 13, 1988 (Pet. App. 79a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2; Section 5(a) of the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, 62 Stat. 472 (1948) (formerly codified at 49 U.S.C. (1976 ed.) 5b and currently codified at 49 U.S.C. 10706); Sections 3, 4, and 4B of the Clayton Act, 15 U.S.C. 14, 15, and 15b; 28 U.S.C. 1292(b); and Fed. R. Civ. P. 56(c) are reprinted at Pet. App. 323a-26a.

STATEMENT OF THE CASE

This case involves a longstanding conspiracy to eliminate direct competitors and to monopolize the transportation and handling of iron ore on the Great Lakes. So ruthlessly predatory was the conspiracy that the United States brought a criminal antitrust prosecution against respondents on the same facts (*see* Pet. App. 216a). Yet, the court below held, in conflict with the decision of the District of Columbia Circuit in the criminal case, that respondents' conspiratorial acts are immune from antitrust scrutiny.

1. Historically, iron ore was transported across the Great Lakes in vessels ("bulklers") that could be unloaded only by large onshore cranes ("huletts"). The respondent railroads owned the only docks equipped with huletts and thus controlled all docking services for iron ore. By the 1950's, respondents were threatened with competition for the first time as technological advances enabled iron ore to be shipped in "self-unloader" vessels, so named because a conveyor system in the vessel performed the task of unloading ore at the dock. Bulker

vessels were no longer economical, and docks equipped with hulettts were no longer necessary for unloading iron ore. See Pet. App. 8a-9a, 82a-84a; C.A. App. 77-78, 91-92.

Respondents conspired to eliminate and delay, for as long as possible, the competition this technological advance portended for railroad-owned docks. Respondents conspired to preserve their monopoly in several ways, including (Pet. App. 9a-11a, 83a-84a; C.A. App. 78-83, 92-98):

a. Respondents agreed to eliminate the economic advantages self-unloaders would have enjoyed in head-to-head competition with bulkers. Some respondents sought to accomplish this objective by refusing to allow self-unloaders to dock at railroad-owned facilities; other respondents sought to accomplish the same objective by assessing—with no written proposal or filing with the Interstate Commerce Commission—the same handling charges for self-unloaders and bulkers, even though substantially less service was performed.

b. Respondents agreed to boycott non-railroad docks such as petitioner Pinney Dock and Transport Company ("Pinney") since respondents could not dictate the handling charges set by these docks. The boycott included acts by respondents to preclude non-railroad docks from competing with railroad docks in handling iron ore by refusing to make comparable rail services available to non-railroad docks.

c. Respondents agreed to block competition from non-railroad firms by refusing to sell or lease dock space to such firms, including petitioner Litton Industries, Inc. ("Litton").

d. Respondents agreed to impede any effort to transport iron ore by truck from non-railroad docks, eliminating the only cost effective alternative to respondents' transportation of iron ore to steel mills. Pursuant to this agreement, respondents harassed trucks that attempted to move ore from non-railroad docks, including petitioner Pinney.

e. Respondents agreed not to exercise their right of independent action, preservation of which is a condition precedent to any antitrust immunity, and used coercion and threats of retaliation against any co-conspirator that proposed to act independently.

f. Respondents agreed to conceal and not to publicize these agreements, and affirmatively misled petitioners and others concerning their motives and actions.

Although respondents were members of an approved rate bureau, the conspiracy challenged in this litigation is wholly separate from rate bureau activities (218a-20a), and the acts in furtherance of the conspiracy were taken during the course of secret, unpublicized meetings outside the auspices of the railroads' tariff bureau (139a-47a, 262a-65a). In short, the complaints in these cases allege that respondents went far beyond the limited joint conduct authorized by the Interstate Commerce Act and instead sought unlawfully to preserve their monopoly by blocking competition from alternative modes of transportation, including petitioners.

Petitioner Pinney is a dock company in Ashtabula Harbor, Ohio. It is neither owned by nor affiliated with a railroad. Because Pinney is ideally suited for servicing self-unloader vessels (since its dock is not encumbered by hulets), it was a principal target of respondents' conspiracy. Respondents took direct action against Pinney, including boycott, spying and sabotage. Respondents sought to eliminate competition from Pinney both by thwarting the development of self-unloader vessels that could utilize Pinney's services and by effectively eliminating rail and truck transportation from Pinney. In short, respondents combined to neutralize Pinney's substantial economic advantages in the receipt, handling and transshipment of iron ore. See Pet. App. 82a-84a, 219a-20a.

The Litton petitioners were principally engaged in the manufacture and operation of self-unloading vessels. Because the advent of self-unloaders threatened respondents' monopoly, respondents acted to eliminate Litton's entry into this business: respondents refused to handle self-unloaders at their own docks; refused to sell or lease dock space to Litton; interfered with Litton's efforts to develop a dock facility; and raised

spurious challenges to Litton's efforts to bypass respondents' docks. Litton was forced out of business after constructing only two vessels. See C.A. App. 78-80, 93; Pet. App. 82a-84a, 257a-58a, 301a-10a.

2. Shortly after learning of respondents' conspiracy, petitioners Pinney and Litton each filed an antitrust action in the United States District Court for the Northern District of Ohio.¹ The complaints alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, as well as several state law claims under Ohio's Valentine Act. The complaints sought damages and injunctive and declaratory relief. See C.A. App. 82, 85, 97, 99-100.

Respondents moved to dismiss the complaints on numerous grounds, contending that because respondents' activities were subject to regulation by the ICC, their conduct was immunized from the antitrust laws; that petitioners' claims for damages were barred by *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922); that petitioners' claims were barred by the statute of limitations; and that petitioner Pinney lacked standing.²

In a series of opinions entered in 1983 and 1984, the district court carefully examined and rejected respondents' contentions. The district court correctly perceived that respondents' arguments depended upon mischaracterizing petitioners' claims as a "simple ICC rate case" (Pet. App. 120a). The court recognized (*ibid.*) that respondents' mistaken description

¹ Respondents were later indicted for the same conduct in a criminal antitrust proceeding in the District of Columbia. After all respondents' jurisdictional defenses and immunity claims were rejected, four respondents were convicted on pleas of *nolo contendere* and one respondent was acquitted at trial. See *United States v. Baltimore & O.R.R.*, 538 F. Supp. 200 (D.D.C. 1982), *aff'd sub nom. United States v. Bessemer & L.E.R.R.*, 717 F.2d 593, 601 (D.C. Cir. 1983).

Additional civil lawsuits against respondents for the same conduct are currently pending in consolidated pretrial proceedings in the Eastern District of Pennsylvania. *In re Lower Lake Erie Iron Ore Antitrust Litigation*, M.D.L. No. 587 (E.D. Pa.).

² Respondents did not challenge Litton's standing in the district court (see Pet. App. 29a).

"misses the heart of plaintiff[s'] claim" because respondents fail to acknowledge that the alleged conspiracy "falls outside the bounds of day-to-day railroad rate making." Rather, as the court stated, "[t]he issue is whether [respondents] illegally conspired to boycott and eliminate a direct competitor so as to monopolize a market" (*id.* at 91a). Based on that accurate understanding of the case, the court held (*id.* at 113a):

[A] conspiracy to eliminate a competitor cannot fall within [the Interstate Commerce Act's] limited grant of express antitrust immunity, [and thus] plaintiff is entitled to prove its allegations that the defendants conspired to eliminate it as a competitor in order to monopolize the business of providing dock services for the unloading of ex-lake iron ore.

The district court also rejected respondents' contention that petitioners' claims for damages are barred by *Keogh*. See Pet. App. 113a-21a, 211a-15a, 244a. In *Keogh*, this Court held that "a private shipper, [could not] recover damages under [the antitrust laws] because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed." 260 U.S. at 162. Consistently with every court that has considered whether *Keogh*'s bar against antitrust damage claims by shippers also precludes claims by competitors, the district court concluded that *Keogh* was inapposite here because petitioners do not seek "to recover an alleged discriminatory overcharge," but rather to recover for lost business they "suffered as a direct competitor of [respondents]" (Pet. App. 114a).

In assessing Pinney's standing to challenge respondents' conspiracy, the district court weighed the factors prescribed in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*") and concluded that all of the *AGC* factors were satisfied: Pinney was "the direct target of [respondents'] alleged antitrust violations; [respondents'] alleged antitrust activities had as their ostensible purpose directly injuring [petitioner's] ability to compete in the unloading of ex-lake iron ore" (Pet. App. 123a); "the chain of causation between [petitioner's] alleged injury and [respondents'] alleged antitrust violations is directly linked" (*ibid.*); and "[petitioner's] damages claims are sufficiently tangible and non-speculative" (*id.* at 124a).

The district court also denied respondents' motions for summary judgment based on the four-year statute of limitations applicable to federal antitrust cases (Pet. App. 131a-78a, 257a-94a). After an exhaustive review of the factual record, the district court found sufficient evidence of fraudulent concealment (*id.* at 139a-55a, 262a-75a), including affirmative acts cloaking the conspiracy in secrecy, to raise genuine issues of material fact which precluded an award of summary judgment. The district court also found sufficient evidence that petitioners were not aware of crucial facts underlying their antitrust claims, and that petitioners were diligent in protecting their rights (*id.* at 156a-77a, 275a-94a).

3. Following the district court's certification under 28 U.S.C. 1292(b), the court of appeals granted leave to appeal in *Pinney* and *Litton* (Pet. App. 255a, 317a-18a) and consolidated the cases for oral argument. Although expressing confusion "whether certain issues were certified for interlocutory appeal," the court of appeals held that "even those issues not properly certified are subject to our discretionary power of review if otherwise necessary to the disposition of the case" (*id.* at 15a; *see id.* at 75a). Based on that statement of its interlocutory appellate jurisdiction, the court of appeals reversed, in whole or part, virtually all of the district court's holdings.

In large part, the court of appeals' analysis of the substantive legal issues was shaped by the court's failure to perceive that the complaints alleged a conspiracy separate and apart from lawful ratemaking activity and sought damages caused by the conspiracy itself. Instead, the court of appeals analyzed the issues as if each overt act alleged in furtherance of the conspiracy was a distinct claim for which damages were sought. Based on this misreading of the complaints and misapprehension of the district court's decisions, the court of appeals proceeded, incorrectly, to direct that summary judgment be entered dismissing each "claim" that could be construed as "rate-related."

The court of appeals inexplicably chose to address first the damages issues based on *Keogh*. The court acknowledged (Pet. App. 21a) that "the anti-discrimination arguments behind the *Keogh* doctrine lose their force in competitor lawsuits such as this," and it noted that the Second and Third Circuits "have

held that *Keogh* does not apply when the plaintiff is in competition with the defendant" (*id.* at 17a). Nonetheless, the court of appeals extended *Keogh* for the first time in its 65-year history to bar claims by competitors. The apparent rationale for this extraordinary step was the court's conclusion that "the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors" (*id.* at 20a).³

The court of appeals next turned to respondents' contention that their conspiracy to eliminate a direct competitor is immunized from federal antitrust liability by the Interstate Commerce Act ("ICA"). At times relevant to this case, Section 5a of the ICA, as amended by the Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948), 49 U.S.C. (1976 ed.) 5b (currently codified at 49 U.S.C. § 10706), provided that parties to an ICC-approved rate agreement are "relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and with the terms and conditions prescribed by the [ICC]." The court of appeals rejected the district court's holding that a conspiracy to eliminate a direct competitor falls outside this limited statutory grant of immunity (Pet. App. 23a-25a). Instead of perceiving that the complaints alleged a separate and broader conspiracy, the court of appeals viewed the complaints as challenging only lawful ratemaking activity, based solely on the allegation that such otherwise lawful activity was motivated by an anticompetitive purpose (*id.* at 24a). Having thus misconstrued the import of the cases before it, the court of appeals concluded that despite the predatory purpose and effect of respondents' actions, they continued to enjoy total antitrust immunity. That result is directly contrary to the holding of the District of Columbia Circuit in the related criminal case involving the same respondents and the same underlying activities (*see* note 1, *supra*) and conflicts with decisions of this Court.

³ The United States filed an *amicus* brief in support of petitioners' petition for rehearing in the Sixth Circuit. The government's *amicus* brief characterized the court of appeals' holding on *Keogh* as "puzzling and wrong" and stated further that the decision "threatens proper antitrust enforcement by wrongly creating a new immunity from antitrust damage claims [brought by] the railroads' competitors" (Gov't C.A. Am. Br. 1, 3).

On the issue of antitrust standing, the court of appeals splintered respondents' conspiracy into component overt acts, which it regarded as "rate-related." Viewing each overt act in isolation, rather than as a constituent element of the overarching conspiracy, the court held that certain acts were more directly aimed at steel companies who were consumers of rail and dock services than at petitioners and hence that petitioners' injuries were too remote. See Pet. App. 32, 35-36, 76.⁴ The court of appeals therefore held that petitioners—the very competitors against whom respondents' conspiracy was directed—lacked standing to sue.

With respect to the statute of limitations, the court of appeals ruled that in order to establish "wrongful concealment" under *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975), a plaintiff must prove affirmative acts of concealment. The court of appeals did not reject the district court's conclusions that there was sufficient evidence of affirmative acts of concealment to preclude summary judgment (Pet. App. 64a, 76a); the court of appeals simply disagreed with the district court's statement that a factual dispute existed over petitioners' knowledge of, and due diligence in uncovering, the conspiracy (*id.* at 64a-66a, 70a-71a, 76a). The court of appeals did not state that the district court had abused its discretion in denying summary judgment on this interlocutory record (*id.* at 70a). Instead, the court of appeals assumed the role of a trial court and, after its own cursory review of the evidence (but without having obtained the full record from the district court),⁵ resolved the factual disputes and concluded that summary judgment should be granted in favor of respondents.⁶

⁴ The court of appeals acknowledged that respondents had not raised, and the district court did not address, any question of Litton's standing (Pet. App. 29a). The court of appeals reached and disposed of that issue nonetheless.

⁵ Pursuant to Rule 11(e), Fed R. App. P., the record was retained in the district court (Pet. App. 319a-21a). The docket sheets in the court of appeals reflect that the Sixth Circuit never obtained the record from the district court.

⁶ The court of appeals also held (Pet. App. 71a-76a) that Ohio's Valentine Act, which has no statute of limitations, is not preempted by the federal antitrust laws. Hence, any of petitioners' claims under state law, which survive the other rulings by the court of appeals, are not barred by the federal statute of limitations.

REASONS FOR GRANTING THE PETITION

At every turn, the decision of the court of appeals is at war with established legal principles, standards and procedures. Petitioners seek review on three questions of law on which the court of appeals departed in serious and profound ways from long-settled precedent.

This case presents important and recurring questions concerning immunity from the antitrust laws in regulated industries. The court of appeals has effectively nullified the federal antitrust laws in a critical sector of the nation's economy by conferring a broad immunity upon railroads which conspire to put directly competing modes of transportation out of business. The decision below cannot be reconciled with established law governing the scope of immunity conferred by the Reed-Bulwinkle Act. The court of appeals ignored 40 years of jurisprudence interpreting the Reed-Bulwinkle Act. Further, by taking the unprecedented step of applying *Keogh* to bar damage claims by competitors, the decision below places the Sixth Circuit in conflict with the Second, Third, and Ninth Circuits—a conflict which the court of appeals acknowledged but made no attempt to resolve.

This case also presents jurisdictional and prudential questions that implicate the proper functions of federal appellate courts. In conflict with this Court's decision in *United States v. Stanley*, the Sixth Circuit exceeded its prescribed jurisdiction by considering on interlocutory appeal under 28 U.S.C. 1292(b) an issue (Litton's standing) that was never raised in the district court and was not contained in any order certified by the district court. The court of appeals further exceeded the bounds of proper appellate review by directing the entry of summary judgment on standing and on fraudulent concealment following its own cursory *de novo* review of an interlocutory and incomplete record that, as the district court held, contained disputed issues of material fact that precluded summary judgment. Without stating any controlling question of law or determining which questions the district court had actually certified—essential predicates to jurisdiction under Section 1292(b)—and without concluding that the district court had abused its discretion in any respect, but purely on the basis of

its own evaluation of an incomplete record, the court of appeals incorrectly entered judgment as a matter of law.

This Court should grant review to correct the manifestly erroneous decision of the court of appeals.

1. *Statutory Immunity*

a. This Court has repeatedly rejected the notion that the existence of pervasive regulation, or the availability of an administrative remedy, establishes a congressional intent to deny relief under the antitrust laws.⁷ In accordance with the Court's admonition that the judiciary should "not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall, inclusive one" (*California v. FPC*, 369 U.S. 482, 485 (1962)), the established rule is that immunities from the antitrust laws are to be construed narrowly and limited to the scope clearly intended by Congress. *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 126 (1982); *National Gerimedical Hospital & Gerontology Center, Inc. v. Blue Cross*, 452 U.S. 378, 388-89 (1981); *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12 (1976).

Even in the particular context of ICC regulation, this Court has held—both prior and subsequent to passage of the Reed-Bulwinkle Act—that the Interstate Commerce Act does not immunize railroads from antitrust liability. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 414 (1986); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 565 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 314-315 (1897).⁸

⁷ See e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-77 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 224 (1956); *United States v. Philadelphia National Bank*, 374 U.S. 321, 351-52 (1963); *Silver v. NYSE*, 373 U.S. 341, 357 (1963); *California v. FPC*, 369 U.S. 482, 487-90 (1962); *United States v. Borden Co.*, 308 U.S. 188, 195-99, 205-06 (1939).

⁸ See also *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (where there would have been no need to determine whether the Sherman Act barred defendants' conduct if that conduct were immune from antitrust scrutiny); *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958).

This Court recently underscored that ICC regulation does not displace the antitrust laws. *ICC v. American Trucking Ass'n*, 467 U.S. 354, 360 (1984) (*ATA*). In upholding the ICC's authority retroactively to nullify motor carrier tariffs filed in violation of an ICC-approved agreement, this Court stated in *ATA* that "injured parties can recover both damages under [the ICA] and whatever additional amounts the antitrust laws allow." *Ibid.* (emphasis added).

b. In contrast to the broad and absolute immunity the court of appeals conjured up, the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, confers only a strictly limited immunity from the antitrust laws. The Act creates an immunity only to the extent that the parties comply with the rate bureau agreement and with the dictates of the ICC. And the Act [§§ 5a(6),(9)] expressly excludes from the limited grant of immunity conduct that restrains a railroad's right to take independent action. As the district court recognized (Pet. App. 88a-90a n.4)—but the court of appeals ignored—petitioners' complaints allege and the evidentiary record shows that respondents coerced the members of the conspiracy to forgo their statutory right to take independent action. By directing entry of summary judgment in these circumstances, the court of appeals contravened the express language of the Act.

c. The decision below conflicts also with the decision of the District of Columbia Circuit in the related criminal case. The felony indictment and the *Pinney* and *Litton* complaints all alleged the same conduct by respondents. In rejecting respondents' contentions that their conspiratorial activities were immune from liability under the antitrust laws, the District of Columbia Circuit correctly recognized that this is not a "rate" case, that respondents' conspiracy "only incidentally touched upon the setting of rates, its real purpose was to ward off the outside competition heralded by the advent of the self-unloaders." *United States v. Bessemer & L.E.R.R.*, 717 F.2d at 601. It could not be more plain that the Sixth Circuit and the District of Columbia Circuit are in direct conflict on the issue of statutory antitrust immunity. When presented with the same facts (*see* Pet. App. 35a n.17), the District of Columbia Circuit

held that respondents' acts are not immune from antitrust liability and the Sixth Circuit held that they are immune. It cannot be both ways. Respondents' conduct either is immune or it is not.⁹

There is no merit to the Sixth Circuit's suggestion that its holding is not "necessarily at odds" with that of the District of Columbia Circuit because the latter court confronted "entirely different considerations of the role of the United States in the criminal enforcement of the Sherman Act" (Pet. App. 29a n.15). Statutory immunity does not turn on whether the government or a private party is plaintiff, or on whether the proceeding is civil or criminal.¹⁰ A plain and irreconcilable conflict exists and should be resolved by this Court.

d. The Sixth Circuit also misread Congress' intent on the scope of statutory immunity. The opinion below concludes

⁹ Even if the court of appeals were correct in stating that petitioners seek to strip immunity from otherwise lawful conduct solely because that conduct was undertaken with an unlawful purpose, the decision below would still be in conflict with the District of Columbia Circuit's decision in *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877, 887-88 (D.C. Cir. 1958), cert. denied, 361 U.S. 930 (1960). *Aircoach* was central to the analysis of the district court in this case and of the District of Columbia Circuit in the criminal case. The Sixth Circuit, however, ignored *Aircoach*. See also *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) ("[I]t is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme"); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) ("if [lawful acts] are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition"); *Truax v. Corrigan*, 257 U.S. 312, 327 (1921); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

¹⁰ The court of appeals, noting (Pet. App. 28a) that petitioners had "waive[d] claims that [respondents] failed to comply with the rate agreement," relied on that "waiver" in dismissing petitioners' challenge to respondents' anticompetitive conduct. But the court of appeals mischaracterized the record and misconstrued petitioners' "waiver." Petitioners informed the district court only that they would not press claims involving "an interpretation of any technical or peculiar language of [respondents' rate bureau agreement]," but that petitioners would contend "that [respondents] reached and implemented rate agreements without following the very basic public notice procedures set out in the [rate bureau agreement]" (C.A. App. 602).

(Pet. App. 25a-28a) that the Reed-Bulwinkle Act overturned this Court's decision in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). In that case, Georgia alleged that defendant railroads had conspired to fix prices and to discriminate against the State. This Court held that the State could obtain an injunction against the continued existence of the conspiracy.

The ensuing deliberations that led to the passage of the Reed-Bulwinkle Act clearly record Congress' determination to leave intact this Court's decision in *Georgia*. The House Report characterized the allegations in *Georgia* as "involv[ing] activity only in the field of ratemaking," and noted that "passage of the bill will not interfere with th[is] case[], nor prevent the court from making the decree it finds justified by the evidence and the law as it exists without this bill." H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4 & n.1 (1948). This theme was echoed repeatedly by the sponsors. See 94 Cong. Rec. 8591 (1948) (remarks of Sen. Reed) ("The bill has no relation at all to any case that rests upon conspiracy"); 91 Cong. Rec. 11959 (1945) (remarks of Rep. Bulwinkle) (H.R. 2536, the predecessor to the bill enacted, "would not" bar lawsuits against conspiracies and "has nothing to do with [the *Georgia*] case"); *Rate Bureaus, Conferences and Associations: Hearings on S.110 Before the Senate Comm. on Interstate Commerce*, 80th Cong., 1st Sess. 59 (1947) (remarks of Sen. Reed) (*Georgia* case "is based on conspiracy" and so "this bill would have no real effect on the *Georgia* case"); 91 Cong. Rec. 11935 (1945) (remarks of Rep. Bulwinkle) ("[i]f they follow the agreement which has been submitted to, and which has been approved by, the Interstate Commerce Commission, then they are absolved from any violation of the antitrust law; but if they go beyond that, they are not"); 91 Cong. 11932 (1945) (remarks of Rep. Slaughter) ("this act would not relieve [the railroads] if they went completely outside the policy set up herein and entered into some side agreement or some agreement which was clearly a conspiracy and restraint of trade"); 94 Cong. Reg. 8590 (1948) (remarks of Sen. Reed) (the bill "does not . . . remove the carriers from the general provisions of the antitrust laws. It does not render moot or defeat the pending antitrust suit of the State of Georgia").

In light of these plain and repeated statements of purpose, the court of appeals erred in holding that the Reed-Bulwinkle Act immunizes the railroad conspiracy alleged here. The court also erred in holding (Pet. App. 27a) that the Reed-Bulwinkle Act overturned this Court's decision in *Georgia*, a decision which this Court continues to cite with approval. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 56 U.S.L.W. 4539, 4541 (U.S. June 13, 1988). This Court, therefore, should grant review and should reverse the Sixth Circuit's creation of an expansive immunity not contemplated by Congress or recognized by the courts.

2. *Keogh*

a. The decision below creates a conflict among the circuits on the question whether *Keogh* bars antitrust damage actions by competitors. In *Keogh*, this Court held that a *shipper* could not maintain a private antitrust damage action to challenge railroad rates that were filed with and approved by the ICC. *Keogh* has been invoked often in the past 66 years to bar awards of damages in antitrust cases brought by *shippers*. See, e.g., *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). But, with the sole exception of the opinion by the Sixth Circuit in this case, no court of appeals has expanded *Keogh* to bar antitrust damage claims by *competitors*. Three courts of appeals have expressly refused to expand *Keogh* as the Sixth Circuit did in this case; those courts held that competitors may pursue antitrust damage claims in circumstances similar to those presented here.

In *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981), the Second Circuit held that plaintiff competitors who claimed they had been squeezed out of certain markets could seek antitrust damages based on defendant's filing of wholesale electric rates with the Federal Power Commission. The court held that plaintiffs were not barred by *Keogh*, even though the filing of utility rates was a significant component of the alleged antitrust violation. 662 F.2d at 929-31. Similarly, in *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984), the same court held that *Keogh* did not bar an award of damages where plaintiff claimed that one of the methods defendant used to

impair competition was the imposition of an interconnection charge on consumers who used plaintiff's equipment. Although the interconnection charge was contained in a filed tariff, the court held that *Keogh* was inapplicable because "the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged." *Id.* at 820-21. See also *Square D*, 760 F.2d 1347, 1365 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986) (allegations that defendants engaged in conduct "to inhibit or eliminate competition" or conduct "that either was not or could not be approved by the ICC" survive *Keogh*).

As the Sixth Circuit recognized, the decision below conflicts also with the Third Circuit's decision in *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114 (3d Cir. 1979). Like *Litton Systems*, *Essential Communications* was an antitrust suit brought against AT&T challenging its tariff that required the imposition of an extra charge on customers who used plaintiff's telephone equipment. The Third Circuit held that *Keogh* did not preclude antitrust damages in favor of a competitor where a filed tariff implemented a monopolization scheme.

The Ninth Circuit has also rejected the proposition that *Keogh* should be expanded to bar antitrust damage claims by competitors. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1266-67 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

b. There is no merit to the Sixth Circuit's suggestion (Pet. App. 19a-20a n.12) that this Court "appl[ied] *Keogh* to a competitor" in *Georgia v. Pennsylvania R.R.* This Court did nothing of the sort. In seeking leave to file an original action in the Supreme Court, the State of Georgia sued in several capacities, including as the owner of a railroad, *i.e.*, as a competitor of the defendants. But the Court mentioned Georgia's alleged status as a competitor only in the context of assessing the justiciability of the State's claim within this Court's original jurisdiction. Even then, the Court "treat[ed] the injury to the State as proprietor merely as a 'makeweight.'" 324 U.S. at 450. In the portion of its opinion assessing the application of *Keogh*, this Court made no mention of Georgia's

alleged status as proprietor/competitor. And for good reason: Georgia sought no damages in its capacity as a competitor. As the pleadings in *Georgia* show, the only damages the State sought in its "proprietary capacity" were "as a *shipper* of goods and commodities" (No. 11 Orig., 1944 Term, Motion for Leave to File Amended Bill of Complaint; and Amended Bill of Complaint at 25) (emphasis added).¹¹ When this Court applied *Keogh* to Georgia's claims, it was not, as the Sixth Circuit supposed, barring any damage claims brought by a *competitor*.

c. The Sixth Circuit's expansion of *Keogh* also flies in the face of this Court's decision in *Square D*. In *Square D*, this Court reaffirmed *Keogh*'s holding that *shippers* are not entitled to bring a treble-damages antitrust action challenging rates filed with the ICC. The Court did not, however, endorse *Keogh*'s rationale. Instead, the Court relied on *stare decisis* and on the fact that *Keogh* had been a fixture on the legislative landscape for more than 60 years. The Court therefore concluded that any change in this settled scene would have to come from Congress. It is wholly inconsistent with the essential premise of *Square D*—preservation of the status quo—for the Sixth Circuit suddenly to preclude antitrust damage claims not only by shippers (as in *Keogh*, *Georgia*, and *Square D*), but also by *competitors* (who are seeking damages based on lost profits) on the unsupportable premise that "the ICC is the sole source of the rights not only of shippers, but of the entire public including competitors" (Pet. App. 20a). The teaching of *Square D* is that the courts should not depart so abruptly from consistent precedent in an area that has seen "careful, intense, and sustained congressional attention" (476 U.S. at 424).

This Court should grant review and should reverse what the Department of Justice has characterized as a "puzzling and wrong" application of *Keogh* that conflicts with the decisions of

¹¹ Georgia explained that its claim for damages as a proprietor (not of a railroad, but of other institutions in the State) was for the increased costs "of certain merchandise and materials which are transported by defendants into this State to be used by the State of Georgia, itself" (No. 11 Orig., 1944 Term, Brief on Behalf of the State of Georgia On Motion to File Amended Bill of Complaint at 27). See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259-60 (1972) (recognizing that Georgia brought damage claims as a shipper).

other courts of appeals and that "threatens proper antitrust enforcement" (Gov't C.A. Am. Br. 1, 3).¹²

3. *Appellate Jurisdiction.* The Sixth Circuit erred by exceeding its prescribed jurisdiction under 28 U.S.C. 1292(b).

a. The court of appeals had no jurisdiction to consider petitioner Litton's standing to sue. Respondents never challenged Litton's standing in the district court and the orders certified by the district court under Section 1292(b) do not address Litton's standing.¹³ As this Court held in *United States v. Stanley*, 107 S. Ct. at 3060, the court of appeals had "no jurisdiction" to enter an order disposing of respondents' belated attack on Litton's standing. The court of appeals' decision conflicts with this Court's decision in *Stanley* and with "[t]he age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists" (*Christianson v. Colt Industries Operating Corp.*, 56 U.S.L.W. 4625, 4630 (U.S. June 17, 1988)).¹⁴ This manifestly incorrect usurpation of appellate jurisdiction should be reversed.¹⁵

¹² The decision below has already had repercussions. In seeking dismissal and summary judgment in the related multidistrict litigation based on the same conduct (*see* note 1, *supra*), respondents have argued that the decision of the Sixth Circuit broadly immunizes anticompetitive conduct from judicial scrutiny. Respondents' motions remain *sub judice* in the M.D.L. cases.

¹³ Respondents' application for leave to appeal under 28 U.S.C. 1292(b) also made no mention of Litton's standing.

¹⁴ The Sixth Circuit's stated rationale for reaching the issue of Litton's standing is flatly wrong. The court of appeals relied on *dictum* in *Singleton v. Wulff*, 428 U.S. 106 (1976). But this Court held in *Singleton* that it was "an unacceptable exercise of . . . appellate jurisdiction" for the court of appeals to decide an issue on which a party never had an opportunity to present his evidence in the trial court. In any event, *Singleton* did not involve an appeal under Section 1292(b), where, as the Court confirmed in *Stanley*, statutory requirements and principles of judicial economy dictate a more limited appellate role than exists on appeal from a final judgment.

¹⁵ On the merits, the court of appeals' holding that Litton and Pinney lack standing conflicts with established principles. It is preposterous to say that the direct competitors whom respondents conspired to eliminate have no standing to challenge the conspiracy by which their elimination was to be accomplished. The court also erred by assessing petitioners' standing to challenge individual overt acts taken in furtherance of the conspiracy, rather

(footnote continues)

b. More generally, the court of appeals exceeded its jurisdiction under Section 1292(b) by considering the merits of respondents' defenses on the issues of standing and the federal statute of limitations. Having acknowledged that it is "difficult to determine precisely whether certain issues were certified for interlocutory appeal" (Pet. App. 15a), given "the vagueness of the certification procedure employed both by the district court and by our court" (*id.* at 75a), the Sixth Circuit had no jurisdiction to proceed further. *Christianson v. Colt Industries Operating Corp.*, 56 U.S.L.W. at 4630, quoting *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 449 (1850) (" 'Courts created by statute can have no jurisdiction but such as the statute confers' "). The proper certification of a controlling question of law is a statutory prerequisite to interlocutory appeal under Section 1292(b). *Cf. Van Cauwenberghe v. Biard*, 56 U.S.L.W. 4545, 4549 (U.S. June 13, 1988). Since it could not determine the scope of certification, the court of appeals was not empowered to proceed.

(footnote continued)

than their standing to challenge the conspiracy as a whole. This splintering of a conspiracy into its overt acts is directly contrary to the holdings of this Court, *see Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *United States v. Patten*, 226 U.S. 525, 544 (1913), and to the decisions of at least eight courts of appeals. *See, e.g., Engine Specialties Inc. v. Bombardier Ltd.*, 605 F.2d 1, 16 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); *Litton Systems, Inc. v. AT&T*, 700 F.2d at 815-816; *City of Groton v. Connecticut Light & Power*, 662 F.2d at 928-929, 935; *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 95 n.28 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Tunis Brothers Co. v. Ford Motor Co.*, 763 F.2d 1482, 1491 (3d Cir. 1985), *vacated and remanded on other grounds*, 475 U.S. 1105 (1986), *reaff'd*, 823 F.2d 49 (1987), *cert. denied*, 108 S. Ct. 1013 (1988) ("the character and effect of an alleged conspiracy are determined only by analyzing the activities in question as a whole"); *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616, 625-26 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1988); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1190-91 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 828 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 327 (8th Cir.), *cert. denied*, 108 S.Ct. 1728 (1988); *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 526 (9th Cir. 1987); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18 (10th Cir.), *aff'd*, 472 U.S. 585, 599 & n.25, 604 (1985).

c. The court's jurisdictional error was compounded in connection with the federal statute of limitations issue by its failure to identify a controlling question of law. The court of appeals simply second-guessed the district court's determinations that factual disputes precluded entry of summary judgment. By permitting interlocutory review of factual issues, which are reviewable only on appeal from a final judgment—and even then with a very limited scope of review—the Sixth Circuit exceeded the proper limits of its jurisdiction.¹⁶ Cf. *Donlon Industries v. Forte*, 402 F.2d 935, 937 (2d Cir. 1968) (when an issue is reviewable only on an abuse-of-discretion basis the “likelihood of reversal is too negligible to justify the

¹⁶ A district court's discretionary decisions, its factual determinations, and its application of settled legal standards to the particular facts of a case are not appropriately reviewable under Section 1292(b). See *Kenyatta v. Moore*, 744 F.2d 1179, 1186 (5th Cir. 1984) (interlocutory appeal of summary judgment denial not appropriate where it involves “only the application of settled principles, not important, unresolved legal issues”); *Clark-Dietz & Associates-Engineers, Inc. v. Basic Construction Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (“merely fact-review questions inappropriate for § 1292(b) review”); *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 863 (3d Cir.), cert. denied, 431 U.S. 933 (1977) (“§ 1292(b) is not designed for review of factual matters”); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.) cert. denied, 419 U.S. 885 (1974) (on § 1292(b) review, “[i]f the district court has applied the correct criteria to the facts of the case, then . . . we will ordinarily defer to its exercise of discretion”); *Johnson v. Alldredge*, 488 F.2d 820, 822 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974) (certified question which “comprehends factual as well as legal matters” not appropriate for § 1292(b) review); *Slade v. Shearson, Hammill & Co., Inc.*, 517 F.2d 398, 403 (2d Cir. 1974) (interlocutory review not appropriate where underlying factual issues are complex and unresolved); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796, 799 (D.C. Cir. 1971) (*per curiam*) (§ 1292(b) is intended for appellate courts to state controlling principles of law, not to review their application); *Control Data Corp. v. IBM*, 421 F.2d 323, 326, (8th Cir. 1970) (discretionary rulings of a trial court do not present controlling questions of law); *Chappell & Co. v. Frankel*, 367 F.2d 197, 200 n.4 (2d Cir. 1966) (“It is doubtful whether the denial of summary judgment when the applicable law is clear but there is a genuine issue as to a material fact can properly be certified under Section 1292(b)”). Compare *Brown v. Bullock*, 294 F.2d 415, 417 (2d Cir. 1961) (Friendly, J.) (*en banc*) (§ 1292(b) review is appropriate where issue has “precedential value for a large number of other suits”).

delay and expense incident to an [immediate] appeal and the consequent burden on hardpressed appellate courts").

In denying respondents' motions for summary judgment, the district court held that a self-concealing conspiracy suffices to toll the statute of limitations; the court further found, as respondents have conceded (Pet. App. 58a), that even if affirmative acts of concealment are required, there is ample evidence that respondents affirmatively acted to conceal this conspiracy from petitioners and that such fraudulent concealment tolled the statutory period (*id.* at 64a, 76a). Given the district court's disposition, there was no "controlling question of law" on which an appeal might "materially advance the ultimate termination of the litigation" (28 U.S.C. 1292(b)) because the record precluded summary judgment under both the "self-concealing conspiracy" and "affirmative acts" standards for tolling the statute of limitations.¹⁷ The court of appeals revisited the district court's findings that there were genuine issues of fact with respect to petitioners' knowledge of, and due diligence in uncovering, the conspiracy; found on an incomplete record that there were no such genuine issues; and proceeded to mandate summary judgment for respondents on that purely factual basis.¹⁸

¹⁷ There is currently pending before this Court a petition for a writ of certiorari presenting the question as to which of these standards is correct. *State of Colorado v. Western Paving Construction Co.*, cert. pending, No. 87-2027 (filed June 8, 1988).

¹⁸ With respect to the merits of the knowledge/due diligence issues, the Sixth Circuit's decision conflicts with decisions holding that in order for the defense to succeed, a plaintiff must be aware of conduct that is not merely harmful, but *actionable*. See *Bowen v. City of New York*, 476 U.S. 467, 480-82 (1986), *aff'g*, 742 F.2d 729, 738 (2d Cir. 1984); *Baskin v. Hawley*, 807 F.2d 1120, 1131 (2d Cir. 1986); *Richards v. Mileski*, 662 F.2d 65, 68-70 (D.C. Cir. 1981); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698 (9th Cir. 1977), *vacated and remanded on other grounds*, 437 U.S. 322, 329-30 n.12 (1978) (knowledge of defendant's "growing dominance of the market was not equivalent to notice of monopolization" under the fraudulent concealment doctrine). Compare *Philco Corp. v. RCA*, 186 F. Supp. 155, 164 (E.D. Pa. 1960).

(footnote continues)

Not only was there no "controlling" legal issue on fraudulent concealment,¹⁹ but the court of appeals' *de novo* resolution of that issue did nothing to "materially advance the ultimate termination" of this protracted litigation. See, e.g., *Clark-Dietz & Associates v. Basic Construction Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (§ 1292(b) review must "materially advance, not retard" the litigation); *Kraus v. Board of County Road Commissioners*, 364 F.2d 919, 922 (6th Cir. 1966) (§ 1292(b) review is not appropriate where disposition in the court of appeals takes longer than disposition in the district court). When the court of appeals entered its opinion, some two and one-half years after oral argument, its wholly factual recitation of evidence on fraudulent concealment did absolutely nothing to advance the litigation because the court simultaneously held that Ohio's Valentine Act, providing that "no statute of limitations" would bar an action under state law, was *not* preempted by the federal limitations period (Pet. App. 71a-75a). Since the same facts form the basis for the state and federal causes of action, the court's foraging through the facts on fraudulent concealment was a pointless abuse of Section 1292(b) jurisdiction.

(footnote continued)

The Sixth Circuit's further holding that, as a matter of law, knowledge of unilateral action by individual respondents put petitioners on notice of a conspiracy to monopolize, fails to recognize the essential distinction in antitrust law between unilateral and joint conduct. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). The decision below also conflicts with cases holding that awareness of *joint and concerted*—not unilateral—conduct puts plaintiffs on notice of an antitrust conspiracy claim. See *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155-56 (10th Cir. 1981) *cert. denied*, 454 U.S. 1164 (1982); *Crummer Co. v. DuPont*, 255 F.2d 425, 430-33 (5th Cir.) *cert. denied*, 358 U.S. 884 (1958); *American Tobacco Co. v. People's Tobacco Co.*, 204 F. 58, 62 (5th Cir. 1913). Compare *City of El Paso v. Darbyshire Steel Co.*, 575 F.2d 521, 524 (5th Cir. 1978) (where there was knowledge of joint conduct).

¹⁹ See *In re Beef Antitrust Litigation*, 600 F.2d 1148, 1170 (5th Cir. 1979) (the issue of when the statute of limitations begins to run "is a factual one . . . not determinable on a motion for summary judgment"); *Sperry v. Baggren*, 523 F.2d 708, 711 (7th Cir. 1975) (equitable tolling presents "issues of fact" on which plaintiff's "admissions of knowledge [prior to the limitations period] will, of course, be admissible in evidence against plaintiffs at the trial, but they are not conclusive [on a motion for summary judgment]").

The court of appeals further exceeded its proper appellate role by applying an incorrect standard of review. The court recognized that "in reviewing a district court's ruling denying a summary judgment motion on grounds that a material issue of fact exists appellate review is governed by an 'abuse of discretion' standard" (Pet. App. 52a).²⁰ The court then expressly ignored that rule of law, acknowledging that had it applied the correct abuse of discretion standard, the proper course would have been to decline to address the statute of limitations issue on interlocutory appeal (*id.* at 70a). Instead, the court of appeals exceeded its prescribed jurisdiction under Section 1292(b) by engaging in an inquiry that involved no question of law—"controlling" or otherwise—but was wholly fact oriented.²¹

Without finding that the district court had abused its discretion, the court of appeals simply usurped the role of factfinder: "as did the district judge [we have] reviewed the evidence." Pet. App. 64a. Although concluding that the record "may contain the seeds of support for the finding of the district judge that a factual question of actual concealment was presented"—a perception that, under the correct standard of review, requires affirmance—the court of appeals simply reached a different factual conclusion (*ibid.*). But this Court has expressly stated that an appellate court is not "free to examine . . . the factual record and to draw its own conclusions." *Maine v. Taylor*, 477 U.S. 131, 145-46 n.17 (1986).

The court of appeals plainly departed from its prescribed appellate function and role by sifting through an incomplete

²⁰ *Accord Nelson v. F.W. Woolworth Co.*, 788 F.2d 472, 474-75 (7th Cir. 1986); *United States v. Merchants National Bank*, 772 F.2d 1522, 1524 (11th Cir. 1985); *Johnson v. Bryant*, 671 F.2d 1276, 1279 (11th Cir. 1982); *FDIC v. Dye*, 642 F.2d 833, 835 (5th Cir. 1981); *National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962).

²¹ "[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966).

record on an interlocutory appeal from the denial of summary judgment. See *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) (vacating the grant of summary judgment based on an incomplete factual record).²² The court of appeals' departure is even more astonishing—and incorrect—because it did not even have before it the full record filed in the district court.²³ The Sixth Circuit's factfinding is particularly in-

²² See also *DeMarco v. United States*, 415 U.S. 449, 450 (1974) (*per curiam*) (vacating court of appeals decision that resolved a "dispositive" and "close" factual issue "based only on the materials then before the court [of appeals]" and without the benefit of an evidentiary hearing in the district court); *Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 568 (8th Cir. 1977) ("an appellate court should not attempt to resolve factual issues on its own"); *Minnesota v. United States Steel Corp.*, 438 F.2d 1380, 1384 (8th Cir. 1971) (on § 1292(b) appeal, the "integrity of the appellate process would be compromised if advisory opinions were rendered on hypotheses which evaporated in the light of full factual development"); *Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 181 F.2d 341, 342 (5th Cir. 1950) (conclusions of an appellate court "should not be grounded upon an indefinite factual foundation").

²³ The court of appeals' docket sheets reflect that the record was retained in the district court pursuant to Rule 11(e), Fed. R. App. P., and was never transmitted to the court of appeals. See Pet. App. 319a-21a. The Sixth Circuit's entry of summary judgment, without the benefit of the very record meticulously reviewed by the district court, contravenes the express requirement in Fed. R. Civ. P. 56(c) that the entire record be reviewed in determining whether there is any genuine issue of fact to preclude summary judgment.

See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (there is no genuine issue for trial only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party") (emphasis added); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (summary judgment may be granted "so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied") (emphasis added). See also *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 930 (1st Cir. 1983) (the court has the "statutory task" of reviewing the pleadings, depositions, answers to interrogatories, etc. to determine whether there is a genuine issue); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981) (the court of appeals must review "the same record that the trial court used"); *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980) ("a court can only enter a summary judgment if everything in the record—pleadings, depositions, interrogatories,

(footnote continues)

appropriate in purporting to resolve issues of credibility without the benefit of live testimony, in any court, and without the benefit of *all* the evidence on the issue of fraudulent concealment. This Court should grant review in order to correct the court of appeals' unprecedented departure from established practice as prescribed by the decisions of this Court and of other courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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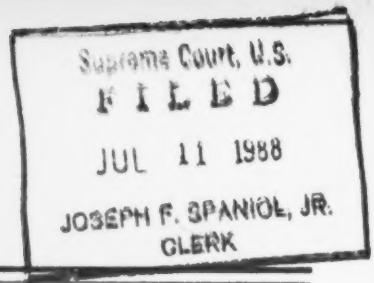
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(footnote continued)

affidavits, etc.—demonstrates that no genuine issue of material fact exists”) (emphasis in original); *Higgenbotham v. Ochsner Foundation Hospital*, 607 F.2d 653, 656 (5th Cir. 1979) (depositions in the record cannot be “ignored” by the court when ruling on summary judgment); *Williams v. Howard Johnson's, Inc.*, 323 F.2d 102, 104-05 (4th Cir. 1963); *Farley v. Abbetmeier*, 114 F.2d 569, 573 (D.C. Cir. 1940) (under Rule 56(c), “we [the court of appeals] are required to look at the pleadings as a whole, not merely at disjointed and disconnected parts thereof”).

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88-72

No. 88-



IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

PINNEY DOCK & TRANSPORT CO.,
Petitioner,

v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

LITTON INDUSTRIES, INC., *et al.*,
Petitioners,

v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

APPENDIX TO

**Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-3653/3654/3876/3877

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PINNEY DOCK AND TRANSPORT CO.,
Plaintiff-Appellant (84-3653),
Plaintiff-Cross Appellee (84-3654),

and

LITTON INDUSTRIES, INC.; LITTON
SYSTEMS, INC.; LITTON GREAT LAKES
CORP.; and ERIE MARINE, INC.,
Plaintiffs-Appellees (84-3876),
Plaintiffs-Cross Appellants (84-3877),

v.

PENN CENTRAL CORP.; THE CHESSIE
SYSTEM CO.; N&W RAILWAY CO.;
NWS, INC.; and BESSEMER & LAKE
ERIE RAILROAD CO.,
Defendants-Appellees (84-3653),
Defendants-Cross Appellants
(84-3654),
Defendants-Appellants (84-3876),
Defendants-Cross Appellees (84-3877),
CHESAPEAKE & OHIO RAILROAD CO.;
BALTIMORE & OHIO RAILROAD CO.;
and CSX CORP.,
Defendants-Appellants (84-3876),
Defendants-Cross Appellees (84-3877).

ON APPEAL from the
United States District
Court for the Northern
District of Ohio.

Pinney Dock v. Penn Central, et al.

Decided and Filed February 3, 1988

Before: ENGEL and KENNEDY, Circuit Judges; and HIGGINS,* District Judge.

ENGEL, Circuit Judge. These consolidated antitrust cases are before the court pursuant to 28 U.S.C. § 1292(b) after a panel of this court granted permission on August 14, 1984 to appeal several orders of the United States District Court for the Northern District of Ohio.

Plaintiffs originally commenced these separate actions in district court, seeking treble damages and injunctive relief for injuries to their business and property allegedly caused by defendants' violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; section 3 of the Clayton Act, 15 U.S.C. § 14; and parallel provisions of Ohio's antitrust laws under the Valentine Act, Ohio Rev. Code §§ 1331.01-02, 1331.04, 1331.06, 1331.08, 1331.12, and 1331.14. Plaintiffs' actions are based on similar allegations that "from at least the mid-1950's" the defendant railroads conspired to restrain trade in, and monopolize, the movement of iron ore by ship across the Great Lakes to docks located on the south shore of Lake Erie, the unloading of these ships at those docks, and the subsequent movement of the ore to steel mills located inland.

The issues certified for interlocutory appeal involve a number of jurisdictional questions, including antitrust immunity under the Interstate Commerce Act, 49 U.S.C. § 10706, application of the *Keogh* doctrine which bars antitrust damage claims in certain situations, exclusive and primary jurisdiction of the Interstate Commerce Commission, standing, statute of limitation/fraudulent concealment under the antitrust

*Honorable Thomas A. Higgins, United States District Judge for the Middle District of Tennessee, sitting by designation.

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laws, and federal preemption of the Ohio antitrust statute of limitations.

I.

A. *The Parties*

The plaintiffs in this consolidated action are Pinney Dock and Transport Company (Pinney) and Litton Industries, Inc., Litton Great Lakes Corporation, and Erie Marine, Inc., (collectively Litton). Pinney provides dock services at Ashtabula, Ohio, for iron ore and other bulk commodities moving over the Great Lakes by ship. For at least part of the time period relevant to these cases, Litton was engaged in the design and construction of large self-unloading vessels and the operation of these vessels, along with conventional bulker vessels, in the movement of iron ore and other commodities over the Great Lakes. In 1974, however, Litton ceased operating such vessels on the Great Lakes.

The defendants are certain railroad companies, including Penn Central Corporation (Penn Central), Baltimore & Ohio Railroad Company (B & O), Chesapeake & Ohio Railway Company (C & O), CSX Corporation, Chessie Systems Company (Chessie), Norfolk & Western Railway Company (N & W), and Bessemer & Lake Erie Railroad Company (B & LE).¹ The defendant railroad companies are all engaged in the business of providing common carriage of goods and commodities by rail to or from Lake Erie docks. In addition, each of the railroad companies owns or has owned, was affiliated with, or operated one or more of these Lake Erie docks.

¹Pursuant to Rule 27(a) of the Local Rules of this court, and the order of the district court of May 23, 1985, we entered an order on June 5, 1985 dismissing from Nos. 84-3653 and 84-3654 B & O, C & O and CSX, collectively referred to as the "Chessie defendants," the parties having reached a settlement.

*Pinney Dock v. Penn Central, et al.**B. Historical Background*

Pursuant to its authority under the Interstate Commerce Act,² the Interstate Commerce Commission (ICC) has for many years regulated the rates set by railroads for the common carriage of goods and commodities by rail to and from Lake Erie. See *Iron Ore Rate Cases*, 44 I.C.C. 181 (1916), *as supplemented*, 44 I.C.C. 368 (1917). Under the Act, the carriers themselves initiate rates and include them in tariffs which must be filed with the ICC. 49 U.S.C. § 10762(a)(1).³ Unless and until suspended, set aside or disapproved, these rates become the lawful rate as between carrier and shipper.⁴

²The initial Act to Regulate Commerce was enacted in 1887. Ch. 104, 24 Stat. 379. Its successor, the Interstate Commerce Act, as amended, was subsequently codified at 49 U.S.C. §§ 1-66. These and related provisions were repealed and recodified by Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, and are currently codified in scattered sections of 49 U.S.C. §§ 10101-11917. Although this recodification was not intended to effect any "substantive change," see § 3(a), 92 Stat. 1337, 1466, it substantially revised the language and structure of the Act. The parties have cited the old version of the Act, but we have cited the current version.

For a good overview of the Interstate Commerce Act, including subsequent amendments, and its relationship to the antitrust laws, see Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of this Endangered Species*, 32 Am. U. L. Rev. 335 (1983).

³A tariff is a filed publication in which a carrier states its rates and charges and which may include rules governing other related services. See Rosenak, *Rate Procedures and Proceedings*, 12 Transp. L. Inst. 1, 1 (1979).

⁴Once a proposed tariff is filed with the ICC, the Commission has a limited time within which to suspend or reject the tariff. During this notice period the ICC may suspend the tariff either on its own motion or on the motion of an interested party. 49 U.S.C. § 10707(a). If the ICC fails to reject the proposed tariff within the applicable notice period the tariff automatically becomes effective. 49 U.S.C. § 10707(b). After a rate becomes effective, the Commission can still investigate

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In setting rates under the Act, a carrier may provide interstate transportation services only at the rate specified and the tariff filed with the ICC. *Id.* § 10761. In addition, a carrier is strictly prohibited from charging any person a different rate for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances." *Id.* § 10741(a). These provisions reflect one of the preeminent purposes of the Act: the prevention of unjust discrimination in interstate commerce.⁵ Differences in rates, classifications, rules, or practices, however, do not violate the anti-discrimination provisions of the Act if they reflect substantive differences in services performed.

violations of the Act and compel compliance with the Act. *Id.* § 11701(a). Judicial review of the ICC's decision under these proceedings is also available but subject to certain limitations. Thus, a decision by the Commission following a § 10707(a) investigation to approve or disapprove a set of rates is a judicially reviewable final decision as is a decision to approve or disapprove a set of rates following a § 11701(a) investigation. In addition, although a decision *not* to investigate the lawfulness of a proposed rate schedule under § 10707(a) is *not* reviewable, an interested party may require the Commission to "investigate the lawfulness of any rate at any time - and may secure judicial review of any decision not to do so - by filing a § [11701(a)] complaint." *Southern Ry. Co. v. Seaboard Allied Mining Corp.*, 442 U.S. 444, 454 (1979).

⁵See *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915):

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. . . . This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Id. at 97.

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Under the Interstate Commerce Act, rail carriers have long been permitted to act jointly in setting rates despite the potential for antitrust liability. Indeed, although the Interstate Commerce Act of 1887 was silent on the issue of collective ratemaking, the ICC condoned the practice even after the enactment of the federal antitrust laws. See *In re Trans-Continental Freight Bureau*, 77 I.C.C. 252 (1923).⁶ Beginning in the 1940's, however, the Department of Justice began enforcing the antitrust laws against related common carriers. In 1944, the State of Georgia brought an action against 21 railroads alleging rate discrimination, antitrust violations and price fixing. This suit culminated in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), in which the Supreme Court held that a conspiracy "to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed" stated a cause of action under the antitrust laws. *Id.* at 462. In so holding, however, the Court emphasized that the State could not directly challenge the continuance of any tariff, since such an action would be within the jurisdiction of the ICC.

Congress responded to this decision in 1948 with the Reed-Bulwinkle Act.⁷ This Act specifically authorizes rate bureaus to agree collectively upon "rates . . . , classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them. . . ." 49 U.S.C. § 10706(a)(2)(A). This Act further provides that parties to an ICC-approved rate agreement are exempt from the antitrust laws with respect to making and

⁶This collective ratemaking was, and continues to be, effected through rate bureaus, which are associations of two or more carriers that disseminate information regarding the rates to be charged for various services by participating rate bureau members. See Dempsey, *supra* note 2, at 354.

⁷Pub. L. No. 80-662, 62 Stat. 472 (1948) (originally codified at 49 U.S.C. § 5b, and currently codified at 49 U.S.C. § 10706).

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carrying out the agreement. 49 U.S.C. § 10706(a)(2)(A).⁸ In addition to the qualified immunity under the Reed-Bulwinkle Act, the *Keogh* doctrine⁹ has long protected carriers from antitrust damages based on alleged discriminatory rates which have been approved by the ICC.

Although these protections from the antitrust laws are considerable, an aggrieved party is not without a remedy for injuries inflicted in violation of the Act. The Act permits any person to bring a complaint at any time for violations of the Act. The Commission must investigate the complaint unless the complaint "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b). Also, a person injured by a violation of the Act can seek damages in a civil action or in a proceeding before the ICC. *Id.* § 11705. In addition to these private remedies, a carrier which willfully violates the Act may be subject to various penalties, fines, and civil damages, as well as other equitable relief, which may be sought by the Government. *Id.* §§ 11703, 11901-11907.

C. Factual Background

The defendant railroads in the instant case formed a rate bureau and entered into a collective ratemaking agreement shortly after the passage of the Reed-Bulwinkle Act. This agreement was subsequently approved by the ICC in 1950 pursuant to 49 U.S.C. § 5(b) (now codified at 49 U.S.C. § 10706). *See Eastern Railroads—Agreements*, 277 I.C.C. 279 (1950). No challenge is made here to the original agreement or to the defendants' right collectively to set rates pursuant

⁸Although the Reed-Bulwinkle Act has been substantially amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), there is no claim that this amendment is applicable to the facts of the instant case.

⁹The *Keogh* doctrine was announced in *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), and recently reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 106 S. Ct. 1922 (1986).

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to the terms and conditions of this agreement. Rather, plaintiffs challenge an alleged anticompetitive conspiracy which, plaintiffs contend, was formulated outside the scope of the agreement and in response to the emergence of self-unloaders and the threat they posed to defendants' control of the dock unloading and land transportation business. According to plaintiffs:

Historically, iron ore had been carried across the Lakes in "bulker" vessels, which had to be unloaded by shore-side cranes, called hulets. Defendants owned all of the docks equipped with hulets, and their docks were exclusively used for unloading bulkers. Defendants collected "handling charges" for unloading bulkers and "line-haul rates" for carrying ore from their lake front docks to inland steel mills. By use of a conveyor system built into a self-unloading vessel, these boats could unload without the assistance of hulets. Self-unloaders threatened to render obsolete defendants' investment in hulets, and elevated the competitive importance of non-railroad docks such as Pinney because they were not incumbered by hulets and were ideally suited for self-unloaders. To eliminate the competitive threat of non-railroad docks and to monopolize the dock handling business, defendants, *inter alia* assessed the bulker handling charge to self-unloaders even though no unloading services were performed, thereby eliminating the primary economic incentive to develop self-unloaders, and refused to publish a commodity line-haul rate from Pinney for the movement of iron ore, thereby eliminating the economic incentive to use Pinney instead of defendants' docks.

Litton entered the Great Lakes transportation market in the mid-1960's and embarked on a venture to construct and operate large, technologically

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advanced self-unloading vessels. Litton's venture was frustrated by defendants' efforts to exclude self-unloaders and non-railroad dock competition and by defendants' concerted refusals to deal with Litton. In particular, defendants refused to cooperate with Litton in developing an unloading dock facility and refused to sell or lease dock space to Litton. Defendants' boycott of Pinney prevented Litton from using Pinney even though Pinney was capable of handling Litton's large self-unloaders. As a result, Litton withdrew from the market after constructing only two vessels.

According to plaintiffs, therefore, it was in response to this competitive threat posed by the development of self-unloaders that the defendants entered into a new and separate agreement and took actions pursuant to this agreement "from at least the mid-1950's," all of which plaintiffs alleged were outside the permissible bounds and protection of the original ICC approved agreement of 1950.

D. The Parties' Allegations

In its amended complaint, Pinney's principal allegation is that the defendants conspired to restrain trade in, eliminate competition in, and monopolize the business of providing both dock services for iron ore and other goods moving over docks on the lower Great Lakes and water carriage for iron ore moving to the same docks. Pinney alleges that the defendants accomplished their illegal purposes by engaging in secret meetings, by refusing to grant non-railroad owned docks, such as Pinney, a competitive rail rate (i.e., a commodity line-haul rate), by arbitrarily placing Pinney in a switching district where it would be ineligible for rail rates competitive with those available at railroad owned docks, by imposing an arbitrarily and unjustifiably high switching charge on cars of a railroad competitor which sought to carry iron ore from Pinney Dock at competitive rail rates, by intentionally

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impeding the construction and use of self-unloading vessels through the imposition of artificial, arbitrary, and unjustifiably high dock handling charges on such vessels and thereby foreclosing Pinney Dock's development as an iron ore handling facility, and by forcing railroads to forgo their right to independent action with respect to rail rates and services and other matters.¹⁰

Pinney alleges that as a result of the defendants' acts and violations, it was injured in its business and property because it was "forestalled and excluded from participating in the business of providing dock services for various commodities, including iron ore, coal and coke." Pinney seeks to recover damages based on the amount of business it lost as a result of the defendants' efforts to drive it out of the iron ore business. They state that "[o]ne way to calculate the amount of business Pinney lost is to determine the amount of iron ore Pinney would have handled absent defendants' conspiracy and multiply that amount by the charges Pinney would have assessed for handling the ore." Pinney also claims that it was injured in its business by the defendants' assessment of bulk handling charges to self-unloaders, which, according to Pinney, was intended to impede the development and operation of such vessels, vessels which Pinney claims it was uniquely capable of handling.

Litton's damage claims are in many respects similar to those of Pinney. Litton's principal allegation is that the defendants conspired to restrain trade in, eliminate competition, and monopolize the business of providing dock services for iron ore and other bulk commodities moving over the docks on the Great Lakes, and also conspired to restrain and sup-

¹⁰In paragraph 18 of its amended complaint, Pinney incorporates by reference and realleges, with respect to coal and coke shipments, the allegations and claims regarding iron ore shipments as set forth in paragraph 13 of the amended complaint.

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press trade in the business of carrying iron ore and other bulk commodities in self-unloading and certain bulker vessels moving on the Great Lakes. Litton also claims that the defendants conspired to foreclose and prevent Litton from developing, selling, or chartering, or using technically advanced vessel, dock and related products and services.

Litton asserts that the defendants accomplished these illegal purposes by continuous secret meetings, by refusing to permit Litton to purchase, lease or use dock facilities which could have accommodated self-unloading vessels, by refusing to handle self-unloading vessels, by taking affirmative action to prevent non-railroad controlled docks from handling bulk commodities transported in self-unloading vessels, by arbitrarily placing unjustifiably high dock handling charges on iron ore discharged from self-unloading vessels, and by forcing railroads to forego their right of independent action. Litton claims that as a result of the defendants' acts and violations, it was forced to cease the design, construction, sale and charter of its advanced self-unloading vessels, the operation of its self-unloading and bulker vessels for the transportation of iron ore and other bulk commodities, and prevented in its efforts to secure and operate dock facilities. Litton claims that, as a result, it was forced to withdraw from the Lake Erie transportation market in 1974.

E. History of the Proceedings

Pinney filed its complaint on September 17, 1980, and a first amended complaint on October 8, 1980, in the United States District Court for the Northern District of Ohio. Litton filed its complaint on March 5, 1981. After extensive discovery was taken, defendants filed a number of motions for summary judgment seeking to dismiss all or some of plaintiffs' claims on jurisdictional grounds. When this onslaught was concluded, United States District Judge Thomas had issued over six rulings consisting of over 500 pages of written memoranda and orders.

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In the first two opinions, issued June 21, 1983, Judge Thomas denied defendants' summary judgment motions in *Pinney*. In the first opinion, Judge Thomas rejected each of the defendants' five grounds for dismissal of Pinney's claims: (1) express immunity from antitrust liability under the Reed-Bulwinkle Act; (2) immunity from antitrust damages under the *Keogh* doctrine; (3) exclusive jurisdiction of the Interstate Commerce Commission; (4) primary jurisdiction of the Interstate Commerce Commission; and (5) lack of standing to raise certain claims. *Pinney Dock & Transport Co. v. Penn Central Corp.*, 600 F. Supp. 859 (N.D. Ohio 1983). In the second opinion, Judge Thomas denied defendants' motions for summary judgment on Pinney's claims which predate the four-year statute of limitations under section 4B of the Clayton Act, 15 U.S.C. § 15(b). In denying the motions, Judge Thomas held that there was a genuine issue of fact whether the fraudulent concealment exception under *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975), tolled the statute of limitations. *Pinney Dock & Transport Co. v. Penn Central Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,608 (N.D. Ohio 1983). Defendants thereafter moved for reconsideration, or certification of these issues for interlocutory appeal. On March 29, 1984, Judge Thomas again fully analyzed defendants' arguments and reaffirmed the June 21, 1983, decision on exclusive jurisdiction, express immunity and standing. The court also directed Pinney to respond to its inquiries concerning the possible application of the *Keogh* doctrine and primary jurisdiction.

On May 10, 1984, the court reaffirmed its June 21, 1983, decision on *Keogh* and primary jurisdiction, and certified both of its *Pinney* decisions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This court granted defendants' petition to appeal on August 8, 1984.

On October 4, 1984, Judge Thomas issued an exhaustive written Memorandum and Order in *Litton* denying defendants' motions for summary judgment on statute of limita-

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tions grounds. The court held that the legal principles relied upon in the *Pinney* statute of limitations opinion were equally applicable in *Litton* and further found that the facts of *Litton* raised a genuine issue of fact of fraudulent concealment by the defendants. In addition, after finding the jurisdictional issues in *Litton* virtually the same as in *Pinney*, the court, on October 5, 1984, adopted its holding in *Pinney* on all issues except standing, which defendants had not challenged. Judge Thomas also certified the *Litton* rulings pursuant to section 1292(b) for interlocutory appeal. On October 25, 1984, a panel of this court granted defendants' petition for leave to appeal the interlocutory orders and consolidated the *Pinney* and *Litton* appeals for briefing and oral argument.

On February 2, 1982, Judge Thomas had also denied defendants' motions for summary judgment to dismiss *Pinney's* pendent state claims under Ohio's Valentine Act. Although the court sustained pendent jurisdiction, the court noted that an issue was raised as to whether the four-year statute of limitations governing federal antitrust actions, 15 U.S.C. § 15(b), preempts Ohio Rev. Code § 1331.12, which provides that no statute of limitations shall bar claims under the Valentine Act. At the court's invitation, the parties submitted briefs on this issue. On October 1, 1982, Judge Thomas issued a written Memorandum and Order, finding that the statute of limitations provision under the Valentine Act was preempted by federal law. The court therefore held that *Pinney's* pendent antitrust claims under the Valentine Act were subject to the Clayton Act's four-year statute of limitations. *See Pinney Dock & Transport Co. v. Penn Central Corp.*, 1982-83 Trade Cas. (CCH) ¶ 65,053 (N.D. Ohio 1982). On May 10, 1984, Judge Thomas again considered the preemption issue and reaffirmed his original decision. The court also certified this issue for interlocutory appeal pursuant to section 1292(b). On August 8, 1984, this court granted *Pinney's* petition for interlocutory appeal.

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On October 4, 1984, Judge Thomas issued a written Memorandum and Order in the *Litton* case adopting his October 1, 1982, preemption ruling in the *Pinney* litigation. Judge Thomas also certified this order for interlocutory appeal pursuant to section 1292(b), and, on October 25, 1984, this court granted *Litton's* petition to appeal and consolidated *Pinney* and *Litton* for briefing and oral argument.

Judge Thomas' meticulous care and scholarship have been immensely helpful to the parties and to us.

On appeal, defendants have challenged virtually every ruling of the district court. Defendants argue that the district court erred in finding that they are not expressly immune from antitrust liability under the Interstate Commerce Act; that the court erred in finding that the *Keogh* doctrine does not bar plaintiffs' antitrust damage claims; and that the court erred in finding that the matters at issue are not within the exclusive jurisdiction of the ICC. The defendants also contend that the district court's refusal to refer certain issues to the ICC under the doctrine of primary jurisdiction was erroneous. The defendants further argue that both *Pinney* and *Litton* lack standing to seek antitrust relief for certain claims. Finally, the defendants contend that the district court erred when it applied the doctrine of fraudulent concealment to toll the Clayton Act's four-year statute of limitations. *Pinney* and *Litton*, joined by the State of Ohio as amicus, also challenge the district court's ruling that the four-year statute of limitations governing federal antitrust actions preempts the statute of limitations provision under Ohio's Valentine Act.¹¹

¹¹Following oral argument, C.D. Ambrosia Trucking Company, Inc., and David W. Reaney and Reaney Dock Company sought leave to file a post-argument amicus brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure. Because of the complexity of this case, and the possibility that the interest of amicus could be affected by the outcome of this case, we granted this motion on January 3, 1986. In

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II.

Initially, we address plaintiffs' contention that defendants are attempting to raise issues in this appeal which were not properly certified pursuant to section 1292(b) and which could not have been within the contemplation of the district court when it certified its orders for interlocutory appeal. Specifically, plaintiffs contend that defendants should not be able to raise the issue of primary jurisdiction, nor should defendants be able to challenge Litton's standing. Plaintiffs further contend that issues involving the fraudulent concealment exception to the statute of limitations should not be addressed to the extent that they do not involve "controlling questions of law."

Upon a review of the district court's order of certification in the *Pinney* case, dated May 10, 1984, and the court's order of certification in the *Litton* case, dated October 5, 1984, we find it difficult to determine precisely whether certain issues were certified for interlocutory appeal. The district court concluded that its jurisdictional orders in the *Pinney* and *Litton* cases, its statute of limitations orders in those cases, and its orders relating to the preemption of the Ohio Valentine Act's statute of limitations, involve "controlling question[s] of law for which there is a substantial ground for difference of opinion and that immediate appeal may materially advance the ultimate termination of this litigation," and the court did not elaborate further. In any event we recognize that even those issues not properly certified are subject to our discretionary power of review if otherwise necessary to the disposition of the case. See *Alexander v. Aero Lodge No. 735, Intern'l. Ass'n*,

disposing of the issues raised in this appeal, we have considered the arguments raised by amicus. Although amicus has raised some arguments which have not been raised by the principal parties to this action, it is sufficient to note that the position of amicus is similar to that of *Pinney* and *Litton*.

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565 F.2d 1364, 1370 (6th Cir. 1977); 9 Moore's *Federal Practice* ¶ 110.25[1] at 270 (2d ed. 1987). Accordingly, we address only those issues necessary to the disposition of this case and to the extent this opinion is construed not to address an issue, that issue is, for the purposes of this appeal, decertified.

III. KEOGH

Defendants argue that *Keogh v. Chicago & N.W. Railway Co.*, 260 U.S. 156 (1922), bars the claims that unreasonable freight and handling charges caused plaintiffs to lose business.

The plaintiff in *Keogh*, a shipper of commodities, sued for antitrust damages on the ground that the defendant railroads restrained competition by conspiring to fix rates for shipment by rail. The ICC had approved the rates as reasonable and nondiscriminatory. The plaintiff claimed damages for the difference between these rates and earlier, lower rates that he alleged would have remained in effect if not for the conspiracy. The Supreme Court held that the plaintiff did not have a cause of action.

The Court listed four reasons for its holding. First, the Court observed that when the ICC finds a rate to be illegal because it is unreasonably high or discriminatory, the shipper can recover damages under the Interstate Commerce Act. The Court asked rhetorically whether Congress intended for the antitrust laws to provide an additional remedy, suggesting that the Court would not easily infer one. Second, the Court explained that "the paramount purpose" of the Interstate Commerce Act is "prevention of unjust discrimination." *Id.* at 163. This required that ICC-approved rates be the sole source of a shippers' rights against a carrier. If a shipper could recover under the antitrust laws for ICC-approved rates, Congress' purpose might be defeated, because the amount recovered would give that shipper an advantage over his competitors. Third, the Court reasoned that an antitrust plaintiff would have to show that the rate that would have

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prevailed but for the conspiracy would have been approved by the ICC. There was no proceeding in which the ICC could issue an opinion on a hypothetical rate. Finally, the Court said that the plaintiffs' damages were speculative because all shippers paid the same rate and the benefit of a lower rate might have gone to the plaintiffs' customers or to the ultimate consumer. *Id.* at 162-65.

Plaintiffs argue, and the district court held, that *Keogh* does not apply because they are defendants' competitors, not customers seeking damages that would give them an advantage over defendants' other customers. Also, the plaintiffs distinguish *Keogh* on the basis that there the plaintiff asked for a rebate from the rates he had paid, whereas here plaintiffs claim damages for loss of business.

The Second and Third Circuits have held that *Keogh* does not apply when the plaintiff is in competition with the defendant. In *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981), the plaintiffs were municipal power companies who bought electricity at wholesale rates from a larger power company, the defendant. The plaintiffs competed with the defendant in selling power to industrial companies in the different municipalities, and the plaintiffs alleged that the defendant tried to squeeze them out of this competition by selling them power at a wholesale price that was higher than the retail price that the defendant charged its industrial customers. The plaintiffs claimed damages resulting from the industrial enterprises' decision to operate outside of the plaintiffs' territories. *Id.* at 927, 934-35. The court held that the discrimination problem of *Keogh* was absent because in *Keogh* the plaintiff's competitors were not represented in the lawsuit, whereas in *City of Groton* the plaintiffs had no competitors other than the defendant. *See id.* at 929-31.

In *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114 (3d Cir. 1979),

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plaintiff Essential was in the business of distributing a telephone answering device called Code-a-Phone. The defendants provided telephone service and also competed with Essential in the distribution of Code-a-Phone. Defendants filed a tariff that required customers who installed an Essential Code-a-Phone to install an additional device as well, which Essential alleged was unnecessary. The tariff did not require customers who bought a Code-a-Phone from defendants to install the additional device. Essential alleged it was the victim of an antitrust conspiracy and claimed damages for loss of business.

The court allowed the claim. The court reasoned that in both *Keogh* and *Essential* the intended beneficiaries of regulation were customers, not competitors of the regulated utility. Thus, the court stated that the *Keogh* rule "has little or nothing to do with [the utility's] duties under the antitrust laws toward its competitors." *Id.* at 1121. Also, the court noted that the plaintiffs did not ask for a rebate from rates paid, as the plaintiff had in *Keogh*. *Id.* at 1122.

Plaintiffs' argument against extending *Keogh* to competitor suits finds some support in *Square D Co. v. Niagara Frontier Tariff Bureau Inc.*, 760 F.2d 1347 (2d Cir. 1985) (Friendly, J.), *aff'd*, 106 S. Ct. 1922 (1986), where the *Keogh* situation was repeated in a suit by the purchasers of truck transportation services. The Second Circuit argued that post-*Keogh* developments undercut all four reasons for the *Keogh* rule. First, the Supreme Court has allowed an antitrust remedy even when a regulatory remedy is available. Second, the existence of class actions can alleviate the danger of a rebate to a single plaintiff. Third, judicial proceedings can be stayed pending a regulatory proceeding to determine whether a hypothetical rate would have been reasonable. Fourth, the Supreme Court has held that a direct purchaser can recover antitrust damages for the full amount of an overcharge, regardless whether he passed part or all of it on to customers.

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Id. at 1352-53. See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

The Second Circuit followed *Keogh* but urged the Supreme Court to overrule it. The Supreme Court praised Judge Friendly's opinion as "characteristically thoughtful and incisive" and did not take issue with his description of the developments since *Keogh*, but reaffirmed the *Keogh* rule for the sake of stability in the law.

[T]he developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute. . . . We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.

Square D, 106 S. Ct. 1930-31.

We do not read this deferential language as an adoption of Judge Friendly's rationale, for on its face it is a polite refusal of an invitation. Since the Supreme Court did in fact uphold the ruling in *Keogh* we construe its cited language to be that the *Keogh* rationale, whatever else might be said of it, still commands, in the Supreme Court's view, the support of Congress. Justice Stevens emphasized "*Keogh's* role as an essential element of the settled legal context in which Congress has repeatedly acted in this area." *Square D*, 106 S. Ct. at 1930.

Furthermore, we do not believe that either *Keogh* or *Square D* was intended to be limited solely to antitrust damage claims brought by shippers. It is true that in both *Keogh* and *Square D* the plaintiffs were shippers, i.e., customers of the defendants, rather than direct competitors.¹² We may also

¹²However, in *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), the Supreme Court did see fit to apply *Keogh* in a case where

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assume that plaintiffs will not gain a preference over their trade competitors if permitted to recover antitrust damages resulting from the defendants' alleged conspiracy. In our view, however, it does not follow that plaintiffs' action for damages is therefore outside the scope of *Keogh*.

When the ICC approves a rate, including a rate purportedly arrived at under the type of joint rate agreement permitted under Reed-Bulwinkle, it necessarily takes an anti-competitive action. This action is justified by the ICA because the statute assumes that the pro-competition policies of the antitrust laws have been taken into account but also assumes that the ICC possesses and ought to have the power to override those policies in order to further national transportation policy as expressed in the Act. Rates must not only protect against overcharging captive customers but must also keep in mind the economic costs of delivery of the service. Regulation of one aspect inevitably begets regulation of the other. Thus, the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors. Plaintiffs here had a right under the ICC to complain to the Commission. We should not easily infer that the Reed-Bulwinkle amendments were not intended to extend to competitor's suits. While such actions may be aimed at achieving some of the objectives of the antitrust laws, they nonetheless

Georgia was both a customer and a competitor. The Court noted that "Georgia sues as a proprietor to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions." *Id.* at 447. The Court then stated "[w]e think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist." *Id.* at 453. While *Georgia* presents a special case because it was decided prior to the passage of the Reed-Bulwinkle Act in 1948, we find the Supreme Court's application of *Keogh* to a competitor to be relevant even under these circumstances. *Georgia* is discussed in greater depth in section IV of this opinion.

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can be inconsistent with the statutory delegation of power to the Interstate Commerce Commission and with the allowance of joint ratemaking activities as expressly authorized by Reed-Bulwinkle.

We recognize that the anti-discrimination arguments behind the *Keogh* doctrine lose their force in competitor lawsuits such as this. For those who believe that the original reasons expressed in *Keogh* still have some substantive persuasive force, in the face of *Square D's* expressed reservations, the other reasons in *Keogh*, we observe, still have considerable applicability here.

In sum, we conclude that the *Keogh* doctrine bars the plaintiffs' antitrust damage claims insofar as these claims are based either on the defendants' own handling charges or on the line-haul rate that was applied from Pinney Dock. To the extent that these rates and charges are otherwise unlawful, we believe that plaintiffs must seek whatever remedies are available under the provisions of the Interstate Commerce Act. At the same time, however, at least some of the plaintiffs' claims for antitrust damages appear to be outside the scope of the *Keogh* doctrine. Litton contends that the defendants refused to permit Litton to purchase, lease or use dock facilities which could have accommodated the technologically advanced self-unloading vessels being designed and constructed by Litton. These allegations are plainly not related to the defendants' handling charges or to the commodity line-haul rate applied from Pinney Dock and, to that extent, *Keogh* would not bar antitrust damage claims based on such allegations. Plaintiffs allege that defendants used harassing tactics and spurious challenges to try to forestall legitimate business activities of competitors. To the extent that these alleged acts are unrelated to defendants' rates, any damages suffered therefrom would not be barred by *Keogh*.

Plaintiffs have raised other claims as well, but it is less clear from the face of these claims that they are not rate-related

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and therefore within the scope of *Keogh*. Plaintiffs contend that defendants refused to handle self-unloading vessels at docks owned or operated by defendants and that defendants boycotted Pinney Dock. However, if this boycott or refusal to deal took the form of assessing higher rates and charges, it would again appear that these claims are within the scope of *Keogh*. Plaintiffs also allege that defendants divided markets, but if the effect of such division is the lack of rate competition, *Keogh* again would bar recovery. Rather than requiring outright dismissal of these claims, however, we believe that plaintiffs should be afforded an opportunity on remand to amend their complaint in order to clarify these allegations to state a claim for damages consistent with *Keogh*. We note that this is the approach taken by Judge Friendly in *Square D*, 760 F.2d at 1365, and this ruling was specifically mentioned by the Supreme Court and left undisturbed when it affirmed the Second Circuit decision in *Square D*. 106 S. Ct. at 1930 n.28.¹³

IV. ANTITRUST IMMUNITY UNDER THE ICA

Defendants argue that they are immune from antitrust liability for their ratemaking activities because they are parties to the ICC-approved 1950 Eastern Railroad Agreement. The Reed-Bulwinkle Act, which was enacted in 1948¹⁴ as an amendment to the Interstate Commerce Act, gives the parties to an ICC-approved ratemaking agreement immunity from the antitrust laws:

¹³An additional argument which may be equally applicable to competitors and is addressed in *Keogh* and in *Square D* is the speculative nature of any damages. As we have pointed out, their existence necessarily presupposes alternate activity which might have been undertaken by the plaintiffs but for the allegedly violative conduct of the defendants.

¹⁴Pub. L. No. 80-662, 62 Stat. 472 (1948) (current version at 49 U.S.C. § 10706).

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If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the Sherman Act (15 U.S.C. 1, et seq.), the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) do not apply to parties and other persons with respect to making or carrying out the agreement.

49 U.S.C. § 10706(a)(2)(A).

The district court held that the immunity in this provision does not cover a conspiracy to eliminate a competitor. *Pinney Dock*, 600 F. Supp. at 878. On appeal the defendants attack the district court's reasoning, while the plaintiffs endorse it and ask this court to uphold it.

The district court held that the language of Reed-Bulwinkle excludes anti-competitive conspiracies from the grant of immunity. The court found support in the legislative history for this reading of the statute. First the court considered the meaning of the statutory language:

[T]he issue confronting this court is whether the ICC's approval of the defendants' [ratemaking] agreement operates as either an express or implied approval of a later "agreement" to eliminate a competitor and monopolize a market.

600 F. Supp. at 866-67.

This definition of the issue is correct insofar as it refers to the statutory provision that the parties to a rate agreement are exempt from the antitrust laws "with respect to making" the agreement. This definition protects the defendants from liability for their conduct in making the 1950 Eastern Railroads agreements, however, it does not necessarily protect

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them from liability for any other agreement, including the alleged anticompetitive conspiracy.

But Reed-Bulwinkle also exempts the parties to a rate agreement from antitrust liability "with respect to . . . carrying out the agreement." Thus, if the parties to a rate agreement conform with the agreement when setting rates, they are exempt from antitrust liability.

So long as defendants stay within the framework of the rate agreement and conform their rates to those approved by the Commission, it cannot make a difference that their underlying intent may be anti-competitive. The difficulty with the district court's conclusion is that while it takes into account the exemption for *making* a rate agreement, it is irreconcilable with the exemption for *carrying out* a rate agreement:

[N]othing in the present record indicates that the ICC ever "approved" or even was aware of defendants' alleged predatory conspiracy to boycott and eliminate plaintiff as a competitor. The 1950 Eastern Railroads Agreement, which merely establishes the procedures for discussing rate matters and reaching rate agreements, cannot be read as impliedly or expressly "approving" such a predatory conspiracy.

600 F. Supp. at 867. Assuming that this reasoning is adequate as far as it goes, it still ignores the reality that the Agreement was only the first, not the last word, in the Acts of the defendants which it contemplated. It was the establishing of rates which was the purpose of the Agreement, and it is the rates and the incorporated provisions concerning their application which lie at the heart of plaintiff's complaint. It is difficult if not impossible to contemplate how the railroads could establish rates under the Agreement without communication with one another and even more difficult to hypothesize how such communication, in an area which is undeniably anti-competitive even in its effect, could not always be construed as capable of anti-competitive motivation.

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Therefore, the challenged activities must be measured against the fact that concerted activity was contemplated by the Commission in its original recognition of the 1950 Agreement. The real issue is whether in such circumstances the task is one of determining if the defendants' conduct was within the framework of permissible activity condoned by the Commission's approval of the Agreement. It is asserted that much of the evidence in this case will concern private communications among the alleged conspirators and allegations of the withholding of certain exchanges from the plaintiffs. Such contentions, however, seem to us to be inextricably intertwined with the question of whether the 1950 Agreement itself was violated, a question which should be addressed, at least first, to the wisdom and expertise of the ICC.

The district court also held that the legislative history of Reed-Bulwinkle shows that Congress intended to exclude anticompetitive conspiracies from the antitrust exemption. The court inferred this from legislative history indicating that Reed-Bulwinkle left intact the Supreme Court's decision in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). 600 F. Supp. at 871, 873-74. We are unable to agree.

In *Georgia*, the State of Georgia sued several northern and southern railroads under the antitrust laws. Georgia alleged that the railroads conspired to fix rates in a manner that prevented her shippers and sellers from gaining access to national markets. Georgia also alleged that the northern railroads forced the southern railroads to take part in the conspiracy. The rates were approved by the ICC. However, the defendants acted through rate bureaus that were not approved by the ICC; at the time the law did not provide for ICC approval of rate bureaus. Georgia alleged that the setting of rates through rate bureaus violated the antitrust laws. The complaint asked for damages and an injunction to end the conspiracy. 324 U.S. at 443-44, 455.

The Court held that *Keogh* barred the claim for damages because the rates were approved by the ICC. 324 U.S. at 453.

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But because *Keogh* only addresses damage claims, the Court allowed the injunctive claim to proceed. *Id.* In this regard the Court made a statement that the plaintiffs in the present case rely on to argue that there is no immunity for an anticompetitive conspiracy:

[W]e find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier.

Id. at 458.

The legislative history that led the district court to conclude that Reed-Bulwinkle left *Georgia* intact included several statements to that effect by the law's sponsors. For example, after the law passed Representative Bulwinkle said:

The charge made against the railroads in the Georgia case is that they combined and conspired to fix rates by coercion and to discriminate against Georgia. A combination or conspiracy of that kind would not be protected or immunized [under the new law].

600 F. Supp. at 871 (quoting 94 Cong. Rec. App. 4033-34 (1948)). The district court also cited the final House and Senate Reports:

The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, *except as to such agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body* upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

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600 F. Supp. at 871 (quoting H.R. Rep. No. 1100, 80th Cong., 2d Sess., reprinted in 1948 U.S. Code Cong. & Admin. News 1848 (1948)) (emphasis added).

We do not read the statement from the House and Senate Reports that "The bill leaves the antitrust laws to apply with full force and effect" as preserving the *Georgia* rule that injunctive relief is available against anticompetitive conspiracies. This statement was qualified, as emphasized above, by a statement that the antitrust laws will not apply to agreements that have been approved by the ICC. Thus, if the *Georgia* case had arisen after the enactment of Reed-Bulwinkle, and if the rate agreement had been approved by the ICC, the Supreme Court would have dismissed the injunctive claim.

Our view of the legislative history finds support in two Supreme Court cases. In *Pan American World Airways v. United States*, 371 U.S. 296 (1963), the Court stated that the result in *Georgia* "might today be different as a result of the Act of June 17, 1948, 62 Stat. 472, which gives the Interstate Commerce Commission authority to approve combinations of the character involved in that case and give them immunity from the antitrust laws." *Id.* at 306 n.11. Similarly, in *Square D* the Court stated:

The legislative history of Reed-Bulwinkle explains that it was enacted, at least in part, in response to this Court's decision in *Georgia* In that case, after restating the holding in *Keogh*, the Court held that, although *Georgia* could not maintain a suit under the antitrust laws to obtain damages, it could obtain injunctive relief against the collective rate-making procedures employed by the railroads. The Reed-Bulwinkle Act thus created an absolute immunity from the antitrust laws for approved collective ratemaking activities.

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In light of plaintiffs' waiver of claims that defendants failed to comply with the rate agreement, there is no need to remand the compliance issue to the district court. Indeed, if such claims were to go forward, the question would arise whether they should be referred to the ICC. Such a referral is what plaintiffs wanted to avoid by waiving claims of non-compliance with the rate agreement. In sum, the effect of Reed-Bulwinkle together with the waiver is that all rate-related claims should be dismissed.¹⁵

¹⁵In *United States v. Bessemer and Lake Erie R. Co.*, 717 F.2d 593 (D.C. Cir. 1983), the D.C. Circuit upheld the criminal conviction of appellant railroad for Sherman antitrust violations arising out of a 1956 agreement to eliminate or inhibit competition from private docks in handling iron ore on Lake Erie. Speaking of intent, the court observed:

The activities described in the indictment do not fit within the narrow [§ 10706] privilege. First, the indictment does not attack the rate bureau itself. It alleges, instead, that some members of the rate bureau entered into a separate agreement. This agreement only incidentally touched upon the setting of rates; its real purpose was to ward off the outside competition heralded by the advent of the self-unloaders.

More than mere purpose or "intent" distinguished this separate conspiracy from the rate bureau. Several of the actions taken by this separate conspiracy were not "in conformity with" the rate bureau's [10706] rate agreement.

Some of the actions were procedurally inconsistent with section [10706]. Paragraph 23(d) of the indictment alleges that defendants "quot[ed] the same charges for handling iron ore from self-unloaders as from bulkers even though services identified in the applicable tariffs were not to be performed." The crux of this charge is that handling the self-unloaders represented a significantly different type of service. Rather than promulgating a new rate for this new service in accordance with ICC requirements, the conspirators shielded the new joint rate from ICC scrutiny.

Id. at 600-01 (citations and footnotes omitted). The D.C. Circuit also correctly confined itself to the special role of the United States in enforcing the criminal aspects of the Sherman Act, noting that:

V. ANTITRUST STANDING

Defendants argue that Pinney does not have standing to bring claims concerning the assessment of handling charges on self-unloaders, the refusal to let self-unloaders operate at docks owned by the railroads, and the refusal to sell or lease dock space to Litton. Defendants also argue that Litton lacks standing to recover for the refusal to grant Pinney a competitive rail rate, the assessment of handling charges on self-unloaders, and the monopolization of land transportation.

In the district court, defendants challenged Pinney's standing on certain claims, including apparently the ones on which defendants argue lack of standing now. But defendants did not challenge Litton's standing below. Plaintiffs argue that because of this the court should not address the arguments about Litton's standing.

"It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).¹⁶ This rule is not jurisdic-

The offense charged in this case is not subject to ICC remedial jurisdiction. The government does not seek to amend the [10706] rate agreement or to alter prospectively the rates set by the [10706] rate bureau; it seeks to punish an illegal anti-trust combination which happened to employ a rate bureau. The ICC is not equipped to "remedy" criminal violations of the antitrust laws.

Id. at 600. The court rejected the concept of an immunity argument under Bulwinkle as untimely and declined to address a primary jurisdiction argument. *Id.* at 599-600. We do not find our holdings here necessarily at odds with those in *U.S. v. Bessemer* involving entirely different considerations of the role of the United States in the criminal enforcement of the Sherman Act.

¹⁶This rule applies to a party seeking reversal. *Cf. Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) ("The prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.")

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tional; the Supreme Court has referred to it as a "practice" and a "rule of procedure." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Deviations are permitted in "exceptional cases or particular circumstances," *id.*, or when the rule would produce "a plain miscarriage of justice." *Id.* at 558. The Supreme Court has declined to list comprehensively the circumstances that should prompt an appellate court to reach an issue not raised below. *See Singleton v. Wulff*, 428 U.S. at 121. Furthermore, the Court has stated that this matter is "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* We have carefully considered the case law of our circuit and elsewhere involving the exercise of this limited area of discretion and conclude that to the extent the issue is presented with sufficient clarity and completeness and its resolution will materially advance the progress of this already protracted litigation, we should address it. *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1370-71 (6th Cir. 1977). We realize that the importance of our discussion of this issue has been largely subsumed by our rulings on the *Keogh* and *Reed-Bulwinkle* issues.

A. General Principles of Antitrust Standing

In *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (hereinafter *AGC*), the Supreme Court took a fresh look at antitrust standing. *See Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983) (*AGC* was "an obvious attempt to implement uniformity among the circuits"). *AGC* did not repudiate the Supreme Court's previous antitrust standing cases, but rather tried to synthesize them.

Our court has summarized the *AGC* factors:

- (1) the causal connection between the antitrust violation and the harm to the plaintiff and whether that harm was intended to be caused;

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- (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
- (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;
- (4) the potential for duplicative recovery or complex apportionment of damages; and
- (5) the existence of more direct victims of the alleged antitrust violation.

Province v. Cleveland Press Publishing Co., 787 F.2d 1047, 1050-51 (6th Cir. 1986) (quoting *Southaven Land Co.*, 715 F.2d at 1085). *Southaven* said this list of factors is not exhaustive. See *Southaven Land Co.*, 715 F.2d at 1085 n.6. This reading of *AGC* seems correct. See 459 U.S. at 538.

AGC's attempt to synthesize precedents reflected the Court's view that the antitrust standing doctrine is rooted in the common law. The Court argued that when Congress enacted the first antitrust laws in 1890, it assumed they "would be subject to constraints comparable to well-accepted common-law rules." *Id.* at 533. These include "foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract." *Id.* at 532-33. Like common-law adjudication, antitrust standing analysis must be done case-by-case:

There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety

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of claims that may arise make [sic] it virtually impossible to announce a black-letter rule that will dictate the result in every case.

Id. at 535-36. Therefore, while the AGC checklist is the starting point of antitrust standing analysis, a consideration of earlier cases is relevant to the interpretation of the AGC factors.

*B. Defendants' Standing Arguments**(1) The refusal to grant Pinney a commodity line-haul rate and the imposition of handling charges on self-unloaders*

The steel companies, who in the course of shipping iron ore paid the rail and handling charges, were the immediate victims of the defendants' refusal to grant Pinney a commodity line-haul rate and imposition of handling charges on self-unloaders at defendants' docks. Defendants argue that plaintiffs' damages from the handling charges are too indirect. The same argument can be made about Litton's damages from the rail rate. We must apply the five AGC factors to determine whether defendants' contention has merit.

The first AGC factor focuses both on the directness of the injury and the intention of the defendant. The leading case on directness of injury is *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), where the Supreme Court held that an indirect purchaser cannot sue a manufacturer for overcharges imposed on a middleman and passed on to the indirect purchaser.

In *Illinois Brick* the State of Illinois alleged that the defendant, a manufacturer of concrete block, engaged in a price-fixing conspiracy in violation of the antitrust laws. The defendant sold block to masonry contractors, who used the block in masonry structures that they sold to general contractors. The general contractors incorporated the masonry struc-

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tures into larger structures that the state bought. The state sued the manufacturer for the amount of the overcharge that passed from the masonry contractors through the general contractors and then on to the state.

The Court held that the state did not have standing to sue the manufacturer for antitrust damages. The primary reason for this holding was that allowing indirect purchasers to sue "would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers." 431 U.S. at 737. *See id.* at 741-45. Apportioning damages along the chain of distribution would "weigh[] down treble-damages actions with . . . 'massive evidence and complicated theories.'" *Id.* at 741 (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968)).

The Court also refused to make an exception for businesses in which the direct purchaser typically passes on the entire cost of a certain component, for example an item that is resold without alteration. The Court reasoned that proving that this is the practice would also entail "massive evidence and complicated theories." *Illinois Brick*, 431 U.S. at 745 (quoting *Hanover Shoe*).

The other reason for the Court's allowing only direct purchasers to recover was that such a rule would best serve antitrust enforcement. *Id.* at 745-47. Because the injury to direct purchasers is usually greater than the injury to indirect purchasers, direct purchasers have a greater stake in the outcome of litigation and are more likely to sue. *Id.* at 747. Direct purchasers will have even more incentive to sue if they are allowed to recover the full amount of the overcharge. Thus, the Court "elevat[ed] direct purchasers to a preferred position as private attorneys general. . . ." *Id.* at 746.

While directness of injury favors the defendants, the other consideration in the first AGC factor, intent, tends to favor

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the plaintiffs. They allege that the object of defendants' rate-making decisions has been to drive plaintiffs out of business. The Court stated that "there no doubt are cases in which such an allegation [of defendants' intent] would adequately support a plaintiff's claim." *AGC*, 459 U.S. at 537 n.35. The Court also cited an article for the proposition that the "specific intent of [a] defendant to cause injury to a particular class of persons should 'ordinarily be dispositive' in creating standing to sue." *Id.* (citing Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 30 (1971)). The Court further cited an article that "suggest[ed] that standing in a group boycott situation should be based on the purpose of the boycott." 459 U.S. at 537 n.35 (citing Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 Am. U. L. Rev. 795, 814-16 (1976)). However, the Court stated that "an allegation of improper motive . . . is not a panacea that will enable any complaint to withstand a motion to dismiss." *AGC*, 459 U.S. at 537. Thus, intent must be balanced with the rest of the *AGC* factors.

The second *AGC* factor relates to the status of the plaintiff as consumer or competitor. As Pinney competes with defendants in the provision of dock services, and Litton also tried to enter that business, this factor also favors the plaintiffs.

The third *AGC* factor, the degree to which the damages involved are speculative, favors the defendants. To assess the effects of a hypothetical change in line-haul rates or handling charges, the district court would need to undertake the difficult and uncertain task of ascertaining demand elasticities, the input of the challenged charge and other costs in the prices charged by the plaintiff and its competitors, and the role of non-profit considerations in pricing decisions. See *Illinois Brick*, 431 U.S. at 742-43. Further, for Pinney and Litton to prove the extent of their losses from the unavailability of the commodity rail rate and from the imposition of handling

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charges, they would have to produce evidence on the following questions: What non-price factors (such as relationships with railroads, docks, and water transport companies) influenced the steel mills' purchase of transport for iron ore? Assuming plaintiffs can prove how much more demand there would have been for shipment by self-unloader, how much of the increase could Pinney and Litton have absorbed? Assuming that Pinney and Litton could have absorbed all the extra demand for shipping iron ore by self-unloader, would competitors have taken business away from them? If there were no competitors during the time in question, would new competitors have appeared to take advantage of the increased opportunities? Under *Illinois Brick* and *AGC* courts cannot be saddled with the time-consuming and speculative task of sifting through massive evidence to decide such questions.

AGC's fourth factor, the potential for complex apportionment of damages between plaintiffs, also favors defendants. Pinney and Litton could themselves become adversaries: Pinney could argue that lower water transport charges would have caused increased demand for dock services, which would have led to higher charges for dock services; Litton could argue that cheaper dock services would have caused greater demand for shipment by self-unloaders, which in turn would have led to higher prices for Litton's services.

AGC's fifth and final factor is the existence of more direct victims. Plaintiffs argue that the direct purchasers here, the steel mills, cannot sue because of *Keogh*. Thus, if Pinney and Litton cannot sue there will be no "private attorney general" to enforce the antitrust laws in this case.¹⁷ While the steel mills cannot sue for antitrust damages, the mills do, however,

¹⁷It does appear, however, that the same area of activity challenged here has been made the subject of scrutiny by the Justice Department. See note 15, *supra*.

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have a role that takes antitrust policy into account. As *Keogh* mentions, the shippers can challenge rates under the ICA. In adjudicating such a challenge, one factor that the ICC will consider is whether the benefits to transportation policy of uniform rates, which are anticompetitive by nature, outweigh the procompetitive policies of the antitrust laws. Thus, it appears that this factor favors the defendants.

On balance, the *AGC* factors clearly favor the defendants. It is true that plaintiffs are defendants' competitors and that these claims involve allegations of intentional harm. However, it is more significant that plaintiffs are not the direct victims of the defendants' acts. Further, it would be an extremely complex, if not impossible task for the district court to cope with the problems of computation and apportionment of damages. Given these factors, we conclude that we must dismiss the handling charge claim as to both defendants and the rate claim as to Litton.

(2) *The refusal to handle self-unloaders at railroad docks or to sell or lease docks to Litton*

Defendants argue that Pinney cannot claim damages for the refusal to handle self-unloaders at railroad docks, because this would have sent the self-unloaders to Pinney. This argument finds support in a recent decision, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), where the Supreme Court stated that a conspiracy to charge higher than competitive prices is an antitrust violation but "actually benefit[s]" the conspirators' competitors. *Id.* at 583 (emphasis in original).

As for the refusal to sell or lease docks to Litton, defendants apparently overlooked the fact that this claim is not in Pinney's complaint.

(3) *The monopolization of land transportation of iron ore*

The district court dismissed Pinney's claim based on the monopolization of land transport, and defendants argue that

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Litton's claim is even more remote than Pinney's. Plaintiffs do not contest this argument.

Thus, for the reasons enumerated above, we reverse the holding of the district court and find plaintiffs Pinney and Litton lack standing to assert the claims addressed above.

VI. FEDERAL STATUTE OF LIMITATIONS

A. Fraudulent Concealment

In the district court, the defendants moved to dismiss the plaintiffs' claims insofar as they were based upon events or activities which occurred before the four-year limitations period of section 4B of the Clayton Act, 15 U.S.C. § 15b. Treating these motions as motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the district court found that there was a genuine issue of material fact whether the defendants had fraudulently concealed plaintiffs' causes of action which may have accrued before the four-year limitations period. The district court therefore denied the motions. *Pinney Dock & Transport Co. v. Penn Central Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,608 (N.D. Ohio 1983).

Under the doctrine of fraudulent concealment, if a defendant conceals from the plaintiff the existence of a cause of action, the statute of limitations is tolled. To toll the statute, the plaintiff must allege in the complaint that: (1) the defendant concealed the conduct that constitutes the cause of action; (2) defendant's concealment prevented plaintiff from discovering the cause of action within the limitations period; and (3) until discovery plaintiff exercised due diligence in trying to find out about the cause of action. *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). The burden of proving the elements of fraudulent concealment is upon plaintiff. *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233, 234 n.5 (6th Cir. 1974);

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In re Beef Industry Anti-Trust Litigation, 600 F.2d 1148, 1171 (5th Cir. 1979). *But see Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), holding that the burden of showing lack of due diligence shifts to defendant.

In denying the defendants' motions for summary judgment the district court ruled that a genuine issue of material fact existed as to each element of *Dayco*. Defendants attack this ruling and also argue that the district court applied the wrong theory to the first *Dayco* element.

The equitable doctrine of fraudulent concealment represents a longstanding exception to the rule that the plaintiff must commence his action within the period provided by the relevant statute of limitations. "[T]he authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347-48 (1874). However, because "statutes of limitation are vital to the welfare of society and are favored in the law," the plaintiff who invokes the doctrine of fraudulent concealment will be "held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.'" *Wood v. Carpenter*, 101 U.S. 135, 139-40 (1879) (citation omitted).¹⁸

¹⁸This rule of "particularity" has been codified in Rule 9(b) of the Federal Rules of Civil Procedure, which states in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In the instant case, there is no dispute that plaintiffs failed to comply with this rule.

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In the context of private anti-trust actions the doctrine of fraudulent concealment is well recognized by the federal courts, including our own court. See *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230 (6th Cir. 1974); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975). See also Annotation, *Application of Fraudulent Concealment Doctrine to Statute of Limitations in Antitrust Cases* (15 U.S.C.S. § 15b), 72 A.L.R. Fed. 431. As we held in *Dayco*: "We have recognized that the statute of limitations applicable to private anti-trust actions may be tolled where a plaintiff did not file its action in time because of ignorance resulting from a defendant's fraudulent concealment." 523 F.2d at 394.

B. The element of wrongful concealment.

On appeal, the defendants initially contend that the district court below erred in holding that *Dayco's* first element, "wrongful concealment," does not require proof of affirmative acts of concealment. The district court, however, held:

It does not make sense to rigidly apply a statute of limitations where the defendant has carried out its illegal activities in "a manner which precluded detection." As the Supreme Court stated in *Bailey v. Glover*, 88 U.S. 342 (1874):

[Statutes of Limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which should show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent

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fraud the means by which it is made successful and secure. [Emphasis added.]

Pinney Dock, 1983-2 Trade Cas. (CCH) ¶ 65,608 at 69,041 n.6. According to the defendants, the district court's reliance upon *Bailey v. Glover* for the proposition that "wrongful concealment" may also be established by conduct which causes a conspiracy to be carried out "in a manner which precludes detection" or "self-concealing misconduct" is misplaced. We agree with defendants at least to the extent that the Sixth Circuit has apparently not conclusively decided the issue of whether the element of wrongful concealment requires proof of affirmative acts.

In *Campbell v. Upjohn Co.*, 676 F.2d 1122 (6th Cir. 1982), the Sixth Circuit, although not actually confronted with the issue of whether fraudulent concealment required proof of affirmative acts, did recognize that there was a distinction between non-active and active concealment. Plaintiff alleged that a corporation fraudulently induced him to sign a merger agreement and then took additional steps to fraudulently conceal from him the terms of that agreement. The district court held that because the plaintiff failed to satisfy the requirement of due diligence in discovering his cause of action, he was barred by the statute of limitations. On appeal, the plaintiff argued that the due diligence requirement should not apply to cases of "active" fraudulent concealment where the defendant has engaged in affirmative acts of concealment beyond the original fraud itself. Our court rejected this argument, holding "that alleged additional acts of concealment by the defendant beyond the original fraud did not exempt the plaintiff from the requirement of diligence in pleading the federal equitable tolling doctrine of fraudulent concealment." *Id.* at 1128. The court did state, however, that "[a]ctive concealment by the defendant will be considered in determining the reasonableness of the behavior of the plaintiff under the circumstances" in discovering his cause

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of action. *Id.* In reaching this conclusion, the court emphasized that:

[Plaintiff] would have the statute tolled indefinitely, while evidence stales, memories fade and courts and adversaries wait, until the plaintiff at his leisure alleges actual discovery, despite the avalanche of evidence that would put all but the most indiligent plaintiffs on notice of a cause of action.

Statutes of limitations are vital to the welfare of society and are favored in the law. Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain. *Dayco Corp. v. Goodyear Tire & Rubber Co.*, *supra*, 523 F.2d 389 at 394 (citations omitted).

A plaintiff who requests the avoidance of these important objectives owes the courts, the public and his adversaries a duty of diligence in discovering and filing his lawsuit.

Id. In holding that affirmative acts of concealment by the defendant beyond the original fraud do not relieve the plaintiff of the requirement of due diligence, the court therefore joined "those circuits which have declined to formulate a separate rule for cases involving active concealment by the defendant." *Id.*

The Supreme Court has apparently had only two occasions to discuss the doctrine of fraudulent concealment at any length, and both of these cases are quite old. In *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874), which the district court placed heavy reliance upon in the instant case, the Supreme Court held upon the facts then before it that plaintiff's action was not barred by the statute of limitations because, "[t]o hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the

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party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." *Id.* at 349.

In *Wood v. Carpenter*, 101 U.S. 135 (1879), however, the Supreme Court held:

Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.

The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

Id. at 143.

Thus, while *Bailey v. Glover* indicates that the commission of a fraud which "is of such a character as to conceal itself," may be sufficient to toll the statute of limitations under the fraudulent concealment doctrine, *Wood v. Carpenter* holds that "concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

Bailey v. Glover was subsequently followed by the Supreme Court in *Exploration Co. v. United States*, 247 U.S. 435 (1918). The government argued that the principles of *Bailey v. Glover* were applicable to the instant action, and argued further that "[t]here were affirmative acts of concealment; but it is enough that the fraud was such as to conceal itself." *Id.* at 445.

The Supreme Court affirmed the court of appeals, holding:

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When Congress passed the Act in question the rule of *Bailey v. Glover* was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind. We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the government. We are aware of no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the government as well as a private individual.

Id. at 449. See also *United States v. Diamond Coal Co.*, 255 U.S. 323 (1921).

Bailey v. Glover was likewise followed in *Rosenthal v. Walker*, 111 U.S. 185 (1884), which also distinguished *Wood v. Carpenter*. In *Walker*, plaintiff alleged that the bankrupt transferred certain property to the defendant in order to prevent the plaintiff from claiming an interest in that property in bankruptcy proceedings. Although the action was brought after the applicable statute of limitations had expired, plaintiff alleged that the bankrupt and the defendant kept concealed from him the fact of the sale, transfer, and conveyance of the goods.

On appeal to the Supreme Court, the defendant argued that plaintiff's action was barred by the statute of limitations. The Supreme Court rejected this argument stating:

The case of *Bailey v. Glover* is a decision construing the statute which is relied on in this case, and unless subsequently overruled by this court is conclusive of the point under discussion. It has never been overruled. The plaintiff in error relies on the case of *Wood v. Carpenter*, 101 U.S. 135, and *National Bank v. Carpenter, Id.* 567. The first was

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an action at law, the second a suit in equity. The court in both cases was called on to construe a statute of limitations of the State of Indiana, and it followed the adjudication of the Supreme Court of that State upon the same statute. Neither case refers to the opinion of the court in *Bailey v. Glover*, or can be held to overrule or modify it. The case of *Bailey v. Glover* has been often cited by this court, but has never been doubted or qualified. *Wood v. Bailey*, 21 Wall. 640; *Wiswall v. Campbell*, 93 U.S. 347; *Gifford v. Helms*, 98 U.S. 248; *Upton v. McLaughlin*, 105 U.S. 640. We are of opinion, therefore, that the assignment of error under consideration is not well founded.

Walker, 111 U.S. at 190-91. Thus, according to *Rosenthal v. Walker*, *Wood v. Carpenter* is limited to the particular case in which the Court was construing a state statute of limitations and following the adjudications of the Supreme Court of Indiana. See also *Traer v. Clews*, 115 U.S. 528, 538 (1885) ("The case of *Bailey v. Glover*, has never been overruled, doubted, or modified by this court. On the contrary, in *Rosenthal v. Walker*, it was reaffirmed, and was distinguished from the case of *Wood v. Carpenter* . . ."). See, however, *Felix v. Patrick*, 145 U.S. 317 (1892), which neither cites to, nor makes any attempt to reconcile, *Bailey v. Glover* with *Wood v. Carpenter*.

The last reference made to *Wood v. Carpenter* by the Supreme Court occurred in *United States v. Kubrick*, 444 U.S. 111, 117 (1979), where the Supreme Court cited that case for the proposition that, "[s]tatutes of limitations, . . . 'are found and approved in all systems of enlightened jurisprudence,' *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)" Apart from one oblique reference in *Kubrick*, however, the Supreme Court has not recently had occasion to cite or otherwise discuss either *Wood v. Carpenter* or *Bailey v. Glover*. One distinguished commentator has explained the difference

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between active and passive fraudulent concealment as follows:

Where undiscovered "fraud" was the basis of liability, it was universally agreed that no new concealment was necessary and the wrongdoer might remain wholly passive, provided no avenues were open to the plaintiff for discovery of the fraud. But in cases that fell outside the elastic boundaries of the "fraud" exception new difficulties appeared. To permit suspension of the statute of limitations in all cases where the suitor was ignorant of his claim must have seemed hazardous. Behind the decisions there must have lain a conviction that for suspension of the statute outside the field of "fraud" there should be added to the suitor's ignorance some affirmative misconduct by the opposite party, preventing discovery and excusing delay. And when the "fraudulent concealment" exception had once been formulated, the language of the formula itself gave a new direction to judicial inquiries. In examining the factual cases for suspension of the statute they were led beyond a scrutiny of the original cause of action and of the *plaintiff's* later opportunities for *discovery*, to an emphasis on the means by which the *defendant obstructed* discovery.

There can be found in the cases innumerable statements that "fraudulent concealment" involves affirmative efforts by the defendant to prevent discovery. But qualifications are often attached. It is said that the defendant's concealment need not be subsequent to the original wrongdoing, but may proceed or accompany it, provided all his conduct taken together is calculated to mislead or allay suspicion. It is sometimes added that all requirements are satisfied if the original misconduct was of such a kind as to "conceal itself." And finally, in some cases the

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further requirement is added that defendant's efforts must include some element of "fraud" or moral turpitude, though numerous decisions reject such a test. From such a welter of conflicting generalities one can only draw the conclusion that generalities are being overworked, that in each case too wide a variety of fact situations is being included in a single formula."

Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875, 880-82 (1933) (footnotes omitted).

Most of the appellate cases which have addressed the issue in the context of antitrust actions have required allegations or proof of affirmative concealment under the first element of the doctrine of fraudulent concealment. See, e.g., *Hennegan v. Pacifico Creative Service Inc.*, 787 F.2d 1299 (9th Cir. 1986); *Berkson v. Del Monte Corp.* 743 F.2d 53 (1st Cir. 1984); *Rutledge v. Boston Woven Hose and Rubber Co.*, 576 F.2d 248 (9th Cir. 1978); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 461 (2d Cir. 1974); *Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788, 792 (7th Cir. 1964).

The defendants rely on these and other cases to argue that "proof of affirmative acts of concealment such as those involved in the cases cited . . . is essential to protect the important policies underlying the statute of limitations." As defendants point out:

In *Dayco*, after noting that the statute of limitations in private antitrust cases may be tolled by fraudulent concealment, this court cautioned nonetheless that, "as the Supreme Court observed in *Wood v. Carpenter*, 101 U.S. [at 139]: 'Statutes of limitations are vital to the welfare of society and are favored in the law.' Stale conflicts should be allowed to rest undisturbed after the passage of time has made their origins obscure and the evidence uncertain." 523 F.2d

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at 394. The policies of protecting defendants and courts from stale claims counsel against a broad interpretation of tolling doctrines, and the reasons for that approach "are particularly persuasive when viewed against the strong congressional policy in favor of repose in antitrust suits." (citations omitted).

Although the district court below acknowledged the Ninth Circuit's opinion in *Rutledge, Pinney Dock & Transport v. Penn Central Corp.*, 1983-2 Trade Cas. ¶ 65,608 at 69,040, the court nevertheless concluded that the first *Dayco* element did not necessarily require proof of affirmative acts of concealment. According to the district court:

Thus, under *Dayco's* first element, the type of actions of defendants which might wrongfully conceal a conspiracy to violate the antitrust laws can embrace, but are not limited to, fraudulent misrepresentations as articulated in the *Rutledge* reference, *supra*. The actions of defendants can also be those which cause a conspiracy to be carried out in "a manner which precludes detection," *e.g.*, "self-concealing misconduct." See *Gaetzi v. Carling Brewing company*, 205 F. Supp. 615, 620-621 (E.D. Mich. 1962). *Cf. King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982). Hence, the Court finds impermissible the implication of the defendants that "[i]n order to make out the first element of fraudulent concealment Pinney must show affirmative acts of concealment by the defendants" which constitute fraudulent misrepresentations.

Id. at 69,041.

While Judge Thomas appropriately cites *Gaetzi*, Judge McCree's analysis in that opinion leads us to a different result. In *Gaetzi*, a former distributor of Carling Beer brought

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an antitrust action in 1961 seeking damages for defendant's allegedly wrongful termination of his Carling distributorship. Defendant then filed a motion for summary judgment on the ground that the cause of action was barred by the four year statute of limitations applicable to private antitrust actions. Plaintiff in turn argued that the period of limitations was suspended by reason of the defendant's fraudulent concealment.

In addressing this issue, then District Judge Wade H. McCree, Jr., initially noted that, "[t]he contours of this doctrine in relation to private antitrust actions unfortunately are by no means as precise as either of the parties insists." 205 F. Supp. at 619-20. In this regard, plaintiff argued that fraudulent concealment did not require proof of affirmative acts, while the defendant argued that the doctrine did require such proof. Judge McCree initially observed:

It does appear to be settled that where the gravamen of an action is fraud and "the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover, supra*, 88 U.S. at 348.

* * *

The cause of action asserted in the present case, however, is predicated neither on fraud nor on breach of a fiduciary duty, but on violation of the antitrust laws. The first question to be considered then is whether plaintiff is correct in his assertion that in an antitrust action ignorance of the facts constituting the cause of action suspends the prescriptive period, absent affirmative acts of concealment by defendant.

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Gaetzi, 205 F. Supp. at 620. After examining the cases cited by plaintiff, Judge McCree noted that "each of the cases upon which plaintiff relies involved something more than mere silence on the part of the defendant." *Id.* He further noted:

The illegal conspiracies proceeded in a manner which precluded detention [sic]. The activities of the defendants can be characterized as 'self-concealing.' The fact that the defendant did not take further steps to impede discovery after the plaintiff had sustained injury is unimportant, for the conduct which is denominated 'concealment' may take place before the cause of action accrues as well as afterwards.

Id.

Next, Judge McCree examined the cases cited by defendant for the proposition that an affirmative act of concealment is required in order to toll the statute of limitations. After examining these cases, Judge McCree concluded:

Although the cases cited by plaintiff have sometimes been regarded as supporting the argument that no affirmative act of concealment is required to toll the statute in restraint of trade conspiracy cases, on analysis they all involve self-concealing misconduct and are not incompatible with the rationale underlying the principle that affirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary duty.

Id. at 621.

Applying the foregoing principles to the facts of *Gaetzi*, Judge McCree concluded that no genuine question of fact existed with respect to circumstances which would toll the four year statute of limitations. At least two of Judge McCree's factual conclusions are instructive:

2. *Failure to respond to plaintiff's inquiries.* Plaintiff states that his repeated efforts to obtain from

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defendant an explanation as to the reason for his loss of the Carling distributorship were unsuccessful. He does not claim that defendant, by a false but plausible explanation, dissuaded him from seeking out the facts. All that defendant did was to remain silent. Clearly the silence of defendant could not have been calculated to deter plaintiff from other inquiry, but could only have compounded plaintiff's suspicions. With reason to suspect that the loss of his business was the result of illegal conduct by defendant, plaintiff was obliged to do more by way of investigation than simply to make fruitless inquiries of the suspected wrongdoer. We have previously indicated that concealment necessitates the commission of affirmative acts. Mere silence, where there is no duty to speak, does not toll the statute.

Id. at 622. Judge McCree also concluded:

4. *Self-concealment of the alleged conspiracy.* "Self-concealment" of a conspiracy sufficient to toll the statute of limitations refers to activities in furtherance of the conspiracy which by their nature defy detection. Plaintiff asserts that defendant concealed its unlawful activities by operating through its parent corporation. However, unlike the *American Tobacco* case, *supra*, the relationship existing between the two companies was well known or readily ascertainable. As the uncontroverted affidavit of the executive vice-president of Canadian Breweries Ltd. indicates, the parent-subsidary relationship between Canadian Breweries and defendant has been a matter of record in Canadian's annual report to shareholders since 1945. Furthermore, there is quoted in defendant's brief an excerpt from the plaintiff's deposition in the United States District Court suit in Pennsylvania, in which plaintiff admitted that he had been informed in 1952 that

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the controlling interest in defendant had been purchased by someone in Canada.

....

The report condemned the acquisition by Canadian Breweries as a monopolistic activity. Since this official document was printed and available to the public according to plaintiff's own allegation, even before plaintiff's distributorship had been terminated, it would appear that the alleged conspiracy was no longer concealed and could have been discovered by due diligence well within the statutory period for bringing suit.

Id. at 623. Based in part on the foregoing, Judge McCree therefore granted the defendant's motion for summary judgment dismissing the plaintiff's complaint as being time-barred by the Clayton Act's four year statute of limitations period. Apparently, this case was not appealed to the Sixth Circuit.¹⁹

Thus, according to *Gaetzi*, although self-concealing misconduct may be sufficient for purposes of the first element of fraudulent concealment, the cases involving such conduct "are not incompatible with the rationale underlying the principle that affirmative acts of concealment must be shown except in cases founded on fraud or breach of fiduciary duty."

¹⁹The other case cited by the district judge here to support his conclusion is *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), wherein the Tenth Circuit held "[b]oth of the tests which were set forth in *Ashland Oil Co.*, [567 F.2d 984], were met here. The evidence showed that the defendant actively sought to conceal its price fixing activities, and the defendant's conduct, by reason of its fraudulent nature, was inherently self concealing." *Id.* at 1156. See also *Baker v. F. & F. Investment*, 420 F.2d 1191, 1199 (7th Cir. 1970) ("[w]here, as in the case of many conspiracies in violation of federal antitrust laws, the wrong is self-concealing, little need be added in order to justify tolling the statute.").

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Gaetzi, 205 F. Supp. at 621. Moreover, Judge McCree emphasized that "self-concealment" of a conspiracy sufficient to toll the statute of limitations refers to activities in furtherance of the conspiracy *which by their nature defy detection.*" *Id.* at 623. Mere silence, or one's unwillingness to divulge one's allegedly wrongful activities, is not sufficient. As the underlying cause of action here is based upon alleged antitrust violations not fraud, we agree with Judge McCree's rationale in *Gaetzi* that a plaintiff should be required to prove affirmative acts of concealment, particularly in light of the strong policy in favor of statutes of limitations.

3. *Scope of Review of Denial of Summary Judgment*

When an appellate court reviews a grant of summary judgment, the district court decision is reviewed *de novo*. *See, e.g. National Bank of Detroit v. Shelden*, 730 F.2d 421, 423 (6th Cir. 1984); *Glenway Industries, Inc. v. Wheelabrator-Frye Inc.*, 686 F.2d 415, 417 (6th Cir. 1982).

However, in reviewing a district court's ruling denying a summary judgment motion on grounds that a material issue of fact exists appellate review is governed by an "abuse of discretion" standard. *See, e.g., United States v. Merchants National Bank of Mobile*, 772 F.2d 1522, 1524 (11th Cir. 1985); *Marcus v. St. Paul Fire & Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981); *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979). The difference in the standards of review has been explained as follows:

Discretion plays no real role in the grant of summary judgment: the grant of summary judgment must be proper under the above principles or the grant is subject to reversal. The trial court may, however, exercise a sound discretion in denying summary judgment where, although the movant may have technically shouldered his burden, the court is not reasonably certain there is no triable issue of fact;

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where a portion of an action may be ripe for summary judgment but is intertwined with another claim(s) that must be tried; and in certain other situations.

6 *Moore's Federal Practice* ¶ 56.15[8] (2d ed. 1985).

4. *Review of Evidence on Whether there are Issues of Fact on Dayco Elements*

a. *Whether there is Sufficient Evidence of Affirmative Acts of Concealment in Pinney Dock*

The defendants apparently do not dispute the district court's conclusion that their conduct was sufficient to satisfy the self-concealment standard. That is, if our court should conclude that a self-concealment standard is appropriate in this case, defendants apparently would concede that the district court's application of that standard to the facts of this case and his factfindings was not erroneous.

We have, however, concluded that defendants are correct in their argument that the doctrine of fraudulent concealment requires proof of affirmative acts under facts such as those presented here and in *Gaetzi*. The issue then becomes what kind of conduct is sufficient to satisfy that standard and whether that standard was satisfied here. According to the defendants "[t]he weight of judicial authority holds that in order to demonstrate affirmative concealment, a plaintiff must present evidence of destruction of records, falsification of accounts, or the use of other covert devices" The defendants note that the district court in *Pinney* found evidence of two instances of acts of concealment: (1) that Penn Central had not been "open and honest with Pinney as to the reasons Pinney was denied a commodity rate," *Pinney Dock*, 1983-2 Trade Cas. (CCH) ¶ 65,608 at 69,046; and (2) that Penn Central had "affirmatively misled Pinney into believing that it was willing to 'take care' of Pinney Dock's

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iron ore requests." *Id.* They contend that this evidence, when analyzed, does not constitute affirmative acts of concealment sufficient to meet *Dayco's* requirements.

In *Ohio Valley Electric Corp. v. General Electric Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965), a case involving an alleged antitrust conspiracy in the electric industry, Judge Feinberg held that the plaintiffs had presented:

abundant proof that defendants affirmatively and deliberately concealed the existence of the conspiracy. The conspirators concealed their activities from their customers, the government, and officers and employees of defendants who did not participate. To achieve and preserve secrecy, the conspirators falsified their expense accounts to hide the true nature and purpose of their meetings and trips, made telephone calls at night from pay telephones rather than from their offices, destroyed notes taken at conspiratorial meetings, and instructed newcomers to the conspiracy not to divulge its existence.

Id., at 931-32. Significantly, Judge Feinberg believed that his conclusion was consistent with both Judge McCree's analysis in *Gaetzi*, 205 F. Supp. 615 and with the policies underlying the doctrine of fraudulent concealment discussed by the Supreme Court in *Bailey v. Glover*, 88 U.S. 342.

In *Ingram Corp. v. J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,277 (E.D. La. 1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir. 1983), another case cited by the defendants, the district court discussed what kind of acts are and are not sufficient for purposes of affirmative concealment. According to the district court:

Subparagraph (a) speaks of "clandestine meetings in hotel rooms" at which the rigging of bids was discussed. This allegation amounts to very little, for there is no obligation on the part of antitrust con-

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spirators to advertise their conduct. One cannot expect bid riggers to hold a public meeting for that purpose. However subparagraphs (b) and (c) are quite different. In each plaintiffs allege that the defendants performed certain acts in furtherance of the conspiracy which created the false impression that project bids were competitively made rather than rigged. This is something more than silence; if true, it constitutes an attempt to deceive both the competition and the public into the belief that all of their bids were made legitimately and as the result of competitive considerations. It is precisely the sort of affirmative act of deception required by the jurisprudence.

Id. at 78,414. The affirmative acts referred to in subparagraphs (b) and (c) included submitting prearranged losing bids by the company that had agreed not to receive the award, in order to give the illusion of competition among the corporate defendants, and maintaining agreed-upon ratios of major equipment spreads and positioning equipment in particular localities throughout the world, so as to give the false impression that excessive bids on particular projects were the result of equipment availability rather than of the unlawful conspiracy.

In the instant case, Judge Thomas discussed several instances in which he believed the defendants' actions constituted affirmative acts of concealment, notwithstanding his general conclusion that the defendants' alleged antitrust conspiracy was self-concealing conduct for purposes of the fraudulent concealment exception to the statute of limitations. The first instance of affirmative acts discussed by Judge Thomas involved certain memoranda and letters written in late 1969 and early 1970. In this regard plaintiff submitted evidence of a series of meetings in 1968 and 1969 and argued that they were deliberately kept concealed. For example, a July 17, 1968, letter from J. K. Thorney, B & O director of coal com-

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mercial planning, to the general coal traffic managers-rates of Penn Central and N & W, stated, *inter alia*:

following our day long meeting held in New York on July 9, the matter of handling charges on ex-lake iron ore received from self-unloader vessels was very briefly discussed

. . . Our records also indicate that there was a *verbal agreement* made by all lines to assess the same charges as bulk freights. [Emphasis added by district court.]

Pinney Dock, 1983-2 Trade Cas. (CCH) ¶ 65,608 at 69,043.

As additional evidence of the defendants' secrecy, the district court notes that on August 25, 1969, Thorney again wrote to C. S. Baxter, Chairman, Coal, Coke & Iron Ore Committee (CCIOC) - Eastern Railroads, and stated:

I have just received information that some of the members of the Coal, Coke & Iron Ore Committee, are now in the process of reissuing their ex-lake iron ore tariffs, and there are indications that deviations may be made from the previous tariffs insofar as the manner of publication of such reissues. Under the circumstances, I believe this matter should be discussed by all members *at the conclusion of the next meeting, which is to be held on September 11.*

This subject, of course, should not be listed on the regular docket but handled informally after the regular meeting. [Emphasis added by district court.]

Id. at 69,043-44.

In addition, the district court notes that on March 26, 1970, Thorney also sent a memo to G. A. Sandmann marked "Personal" detailing a discussion on March 24, 1970, about ex-lake iron ore handling charges. In that letter, Thorney stated:

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There was no committee record other than the subject had been reviewed. . . . The above for your personal information only, and not to be disclosed to anyone in any manner at this time.

Id. at 69,044.

Although defendants apparently did not controvert Pinney Dock's assertion that the above mentioned meetings and dealings were kept secret, they argued that they were not obligated to disclose their private business communications and proposals. Pinney Dock, in turn, argued that under the terms of the railroads' 5A Agreement, they had a duty to issue public notices of meetings, proposals, and rate decisions.²⁰

In sum, Judge Thomas concluded that the memoranda and letters discussed above permit an inference that the defendants took steps to insure that their actions would not become public. According to Judge Thomas, "[t]hese affirmative acts may be found by the trier of fact to constitute both wrongful concealment of the alleged conspiracy in violation of the anti-trust laws and acts in furtherance of the conspiracy." *Id.*

²⁰To the extent that plaintiffs are arguing that the defendants kept their meetings and dealings secret in violation of their statutory duty to issue public notices of meetings, proposals, and rate decisions, it would appear that plaintiffs' argument would involve an interpretation of ICC rules, regulations and statutes. This in turn would seem to implicate the issue of primary jurisdiction, an argument which the defendants also raised in support of their contention that this action should be dismissed, or at least deferred to until the ICC has an opportunity to address the issues. However, Judge Thomas seems to have anticipated this problem because he states: "The present issue is not whether defendants had a statutory duty to disclose to plaintiff the details of their informal discussions. For purposes of the present motion, the court need only decide whether a genuine issue of fact exists as to the alleged agreement and communications being carried out in a manner which eluded discovery by plaintiff." *Pinney Dock*, 1983-2 Trade Cas. (CCH) ¶ 65,608 at 69,044.

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In their brief, the defendants apparently do not dispute these findings of "affirmative acts" by the district judge. Indeed, it would appear that these meetings and dealings, which were apparently done in secret and possibly not in compliance with the ICC requirements requiring open and public meetings, are analogous to the secret phone calls in *Ohio Valley Electric Corp.* On the other hand, such secret meetings may be more analogous to the "clandestine meetings in hotel rooms" which were not deemed sufficient for purposes of affirmative concealment in *Ingram Corp.*

Apart from this evidence, the district court also concluded that a genuine issue of fact existed as to whether a series of letters written in 1968 and 1969 by Penn Central in response to Pinney's request for a line-haul commodity rate demonstrated that the defendants concealed the antitrust conspiracy through affirmative misrepresentations to Pinney. Significantly, Judge Thomas found that this evidence was consistent with the *Rutledge* requirement that "one means of wrongful concealment of an ongoing antitrust conspiracy is a co-conspirator's fraudulent misrepresentations." *Pinney Dock*, 1983-2 Trade Cas. (CCH) ¶65,608 at 69,044. According to Pinney, this correspondence led Pinney to believe that Penn Central was acting unilaterally in denying Pinney a line-haul rate and that it was also working to get a commodity iron ore rate established off Pinney's dock.

Sometime in 1968 George Weir, who was fifty percent owner of Pinney, requested from Penn Central a commodity line-haul rate off Pinney Dock equivalent to that which was applied to the railroad owned docks. Penn Central's Wilkins wrote to Weir on September 4, 1968, stating:

I am informed by our rate people that the subject of publishing rates on pellets originating at private docks on Lake Erie has been considered at a recent meeting of the Coal, Coke & Iron Ore Committee at which time there was a recommendation against

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extending the application of ex-lake iron ore rates to apply from privately owned docks other than those equipped to handle iron ore from bulk carriers. Under the circumstances, Penn Central must be governed by this recommendation.

Id. at 69,045. On October 3, 1968, Weir responded to this letter by stating that he was "still le[ft] . . . in the dark because you have not given me the justification on which this recommendation was supposedly based." *Id.*

Funkhouser, who was also an executive of Penn Central, responded to this letter by explaining that the basic reason for Penn Central's refusal to publish ex-lake rates from the Pinney Dock was that it would be financially unsound to do so:

[T]he Coal, Coke, and Iron Ore Committee of the Eastern Railroads has recommended against extending the application of ex-lake iron ore rates from additional docks. Traditionally, rates have been confined to apply from a relatively few docks from which ore moves in large and steady volume. . . . This had been advantageous to the shipping public and to the railroads. It seems clear that to depart from this scheme . . . would be damaging both to the railroads and to the iron ore shippers.²¹

Id.

²¹Notwithstanding this apparently valid explanation for Penn Central's refusal to extend an ex-lake rate from Pinney Dock, the district court concluded that "[t]he trier of fact could find from the documents in the record that the true justification for the 'recommendation against extending the application of ex-lake iron ore rates from privately-owned docks other than those equipped to handle iron ore from bulk carriers' was the continuing secret agreement of February 26, 1958, to deny an iron ore commodity rate from Pinney's dock." *Pinney Dock*, 1983-2 Trade Cas. (CCH) ¶ 65,608 at 69,045.

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On March 28, 1969, Weir made a further request that Penn Central extend its ex-lake iron ore rates to Pinney Dock, to which Funkhouser again responded: "It seems clear that to depart from this scheme of transportation by making the ex-lake iron ore rates applicable on spasmodic shipments from what would unquestionably grow to be a sizeable number of small docks would be at variance with the concept underlying said rates and would be damaging both to the railroads and to the iron ore shippers." *Id.*

Pinney argued before the district court that this correspondence led Pinney to believe that the reason why Penn Central was unwilling to publish a rate was its unilateral concern about Pinney's ability to meet volume requirements. According to Pinney, as late as August 19, 1974, Penn Central continued informing Pinney "that the level of ex-lake ore rates was constructed on a volume basis and the extensions of these rate[s] to facilities which could load only relatively small amounts of ore would make the rates unrealistic." *Id.* Although the defendants attempted to argue before the district court that this correspondence, rather than misrepresenting its actions, actually disclosed both to Pinney and to the ICC that its refusal to extend a commodity rate to Pinney was related to efficiency considerations, Judge Thomas nevertheless concluded that a genuine issue of fact existed as to whether the defendants had misrepresented their reasons for denying the rate to Pinney. According to Judge Thomas:

The inference drawn by defendants can properly be argued to the trier of fact. However, the evidence, read in a light most favorable to Pinney, does not as a matter of law show that defendants were open and honest with Pinney as to the reasons Pinney was denied a commodity rate. A genuine issue of fact exists as to whether Penn Central misrepresented the reasons for its actions so as to conceal the alleged conspiracy.

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Id. at 69,046.

Thus, Pinney initially alleges that the reasons why the defendants denied it a line-haul commodity rate was in order to effect the conspiracy to drive self-unloaders off Lake Erie. The defendants then brought forth evidence in the form of memoranda and correspondence that the reason they denied Pinney such rates was due to a concern with Pinney's low volume.

The final instance of affirmative acts of concealment discussed by the district court involves certain memoranda and correspondence between Pinney Dock and Penn Central during the period of 1973 to 1975. Based on these documents Pinney Dock argued before the district court that "Penn Central periodically misled Pinney into believing that it was ready, willing and able to do business with it. The effect of such misrepresentations was to leave Pinney with the clear impression that Penn Central could, and might, change its mind on rates from Pinney at any moment." *Id.* at 69,046. As the district court noted, Pinney pointed to communications it had with George Wallace of Penn Central in 1970 about granting Pinney a rate. "Several Wallace letters to Pinney indicate that Penn Central was 'glad to discuss . . . the question of a modern rail loading facility to be built by [Pinney], a facility which Penn Central might use in return for issuing an ex-lake iron ore rate from Pinney Dock. Yet, other exhibits show that during this same period, Mr. Wallace was actively participating in meetings and discussions with other railroads on how to limit the use of self-unloaders." *Id.*

As further evidence of misrepresentations by the defendants during the 1973-1975 period, the district court pointed to the deposition of Maynard Walker, president of Pinney Dock, who testified that:

Jim Royston at one time said to me, "Don't worry," he said to me and Joe Del Priore, "Don't worry, boys, Uncle Jim will take care of you."

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Id. The district court also noted that in an internal memorandum of October 1, 1975, which was prepared by Royston of Penn Central it was stated that:

Pinney was reassured that our modification plans for Ashtabula included serious consideration of including Pinney Dock in, or as an adjunct to the consolidated A & B and Union Docks.

Id.

Finally, the district court noted that Pinney presented evidence to show that Royston may have been intentionally misleading Pinney. For example, a former Penn Central employee testified in a special proceeding that:

I was told to meet with Mr. Royston up at Pinney Dock to discuss it. Pinney Dock had offered to pay the entire cost of this conveyor system that would traverse from Pinney Dock over the Union fence tracks. After the meeting we went back. I discussed it with Mr. Ward, and I discussed it with Mr. Royston. Mr. Royston said that it was a lesson in futility, that we were just trying to appease Pinney Dock and keep them quiet. He said Pinney Dock would never get into the Ashtabula switching district, and it would be over his dead body before it got there. Those were the exact words used.

Id. According to Judge Thomas, "[t]hese letters and statements of Penn Central in the 1970's would permit the trier of fact to find that Penn Central affirmatively misled Pinney into believing that it was willing to 'take care' of Pinney Dock's iron ore requests." *Id.*

The defendants argue in their brief that both of these conclusions by the district court should be rejected because the evidence in the record as a whole establishes as a matter of law that Pinney's purported reliance on Penn Central's representations was not "reasonable." See *Rutledge v. Boston*

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Woven Hose & Rubber Co., 576 F.2d at 250. In support of this argument, the defendants claim:

As early as August 31, 1971, Mr. Walker, Pinney's president, stated that he expected Penn Central to "say 'no' to our rate request or, at the least, attempt to stall us, as they had been doing in the past." On October 7, 1971, Mr. Walker again stated his belief that "Penn Central and the B & O/ C & O do not want a private dock with lower handling rates in the picture during this time period, which could well be 5/10 years, due to the effect this new rate would have on existing handling rates of their lessees and possibly themselves." On February 4, 1972, Mr. Walker wrote to Pinney's legal counsel, Mr. Beery, that it "does appear that we will not obtain the iron ore rate from Penn Central on a friendly basis," to which Beery on February 10, 1972 responded that "the present combination will last for at least another decade."

As described above, in 1968 and 1969, when Pinney asked Penn Central for a line-haul rate, Penn Central refused. Penn Central explained that it was following a recommendation made at a CCIOC meeting and that the reason for the refusal was that the interest of the railroads and the iron ore shippers was to restrict line-haul rates to a few docks from which ore moved in large and steady volume. However, Pinney's Mr. Weir testified in a deposition that he did not believe that Penn Central was governed by the CCIOC recommendation, because he "knew that the Penn Central had the right" to act independently of the CCIOC. *Pinney Dock*, 1983-2 Trade Cas. (CCH) ¶ 65,608 at 69,049. Weir also testified that he believed the reason that Penn Central gave for the recommendation: "Being a traffic man, I could conceive of no other reason [for Penn Central denying a commodity rate] than that they had some reservations as to whether we could handle

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the minimum tonnage required on this iron ore rate." *Id.* at 69,049 n.16.

In denying summary judgment, the district court stated that it was unclear whether Weir should have known that Penn Central had submitted to the CCIOC recommendation. The judge stated that "the trier of fact may infer . . . that Weir was warranted" in doubting that Penn Central had surrendered its right of independent action. *Id.* Also, the court ruled that Penn Central's report of the CCIOC recommendation "did not as a matter of law inform Pinney of the existence of the alleged railroad conspiracy." *Id.* at 69,050.

We have, as did the district judge, reviewed the evidence concerning the relationship of the parties quite thoroughly. We conclude that it may contain the seeds of support for the finding of the district judge that a factual question of actual concealment was presented. However, we also conclude that the record leads us to the same conclusion reached by Judge McCree in *Gaetzi*, namely that the time eventually arrived when "the alleged conspiracy was no longer concealed and could have been discovered by due diligence well within the statutory period for bringing suit." *Gaetzi*, 205 F. Supp. at 623.

In August 1970 Beery wrote a file memo that was a record of his meeting with Weir and Pinney's president, Walker. The memo said: "It appears that we have an antitrust action I advised that I had no knowledge as to antitrust actions but that I would obtain and consult the services of someone who is knowledgeable." Walker's desk calendar contains a notation referring to the meeting: "Will sue [Penn Central] under antitrust laws" A memo by Weir also mentions the possibility "of filing an antitrust action."

In September 1971 Beery wrote to Walker:

[Y]ou should consider the formal complaint to the Interstate Commerce Commission possibly fol-

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lowed by an anti-trust action against Penn Central. It would appear that the first action taken must be to the Interstate Commerce Commission, as that agency has the jurisdiction of the dispute.

* * * *

We are considering coupling any administrative action with some widely based investigation of the conditions now prevailing upon the Great Lakes in relation to the unloading of iron ore and the monopolistic conditions there that may significantly affect the public.

In February 1972 Beery wrote Walker a letter strongly urging that Pinney fight Penn Central under the antitrust and interstate commerce laws. This four-page letter contained only one legal argument: "If you can show that the self-unloader vessel will only be built after the rates are established for this type of unloader, then you can show that you are being damaged by Penn Central's refusal to publish competitive rates." The rest of the letter emphasized the business advantages to Pinney Dock of fighting. The tone of the letter is captured in its final sentence: "We can provide the technical means with which to fight this combination, but you have to provide the spirit and the perseverance." In a postscript Beery offered to go to Pinney Dock's office the next month to discuss "possible solutions and alternatives."

In January 1973 Walker responded that he thought that legal action "would be a waste of time and money," that he preferred to wait until Pinney had more self-unloader capacity, and that it would not harm Pinney to "delay court action" until then.

In holding that there is an issue of fact as to whether Pinney knew of its cause of action, the district court relied on Walker's testimony that Beery "didn't know what he was saying" about monopolistic conditions and on Beery's testimony that

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he was not familiar enough with the federal antitrust laws to understand what "monopoly" means under them. *Pinney Dock*, 1983-2 Trade Cas. (CCH) at 69,051. Defendants argued in the district court that if Pinney had been diligent, Beery's advice would have at least prompted the filing of an antitrust action, which "would have provided broad-based discovery of the detailed facts now alleged by Pinney." The court rejected the notion that obtaining discovery would have been a proper motive for filing an antitrust action. *Id.* at 69,055. This observation may in itself have been correct, but it has little relevancy to the realistic question of concealment. The knowledge that the railroads were acting in concert through their joint rate-making activities and any plain understanding of their self-interest was, in our opinion, bound to dispel any uncertainty as to their motive in failing to publish competitive rates. To hold that a tolling or suspension of the limitation of actions must continue unless or until proof positive existed of a wrong (which might never be established in fact) would abort the policy of the law of repose in statutes of limitations of diligence in the equitable principles permitting suspension of them. The plaintiffs are therefore limited in their remaining causes of action to acts and damages occurring within the statutory four year period preceding the filing of their action.

b. Affirmative Acts of Concealment of Litton's Cause of Action

The district court ruled that there also existed an issue of fact whether the Chesapeake & Ohio and Baltimore & Ohio Railroad Companies (C&O/B&O) created a false impression that they were willing to lease dock facilities to Litton.

The district court based its ruling on evidence of a meeting on April 30, 1971 between Litton's president, Preisser, and C&O/B&O's vice president, Sandmann. Before the meeting, Sandmann said in an internal memo that he planned to tell Preisser that C&O/B&O was willing to negotiate for the rental

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of "the so-called Grove Storage area." Sandmann also stated in the memo:

A lease to Litton would, in effect, create a private dock, and the ore could conceivably be trucked . . . to inland mills. The railroad would lose control of the property. Other efforts have been made over the years to establish such private docks along Lake Erie and have been successfully resisted by the railroads.

Defendants argue that the ruling below was wrong, because the district court did not cite evidence that the railroad's expressions of interest in leasing were false or purposely misleading. As for Sandmann's statements that the railroad feared that a lease would allow Litton to "create a private dock" and that the railroads had in the past "successfully resisted" attempts to create such private docks, defendants argue that such statements "merely recognized one disadvantage of arranging a lease."

The district court also based its holding on a letter that Litton received from Penn Central on March 19, 1971. Penn Central had filed a proposal with the CCIOC to establish a charge of \$1.41 a ton for handling ore from self-unloading vessels. Litton protested what it described as an increase over the current rate of \$.41 a ton. Penn Central responded in the March 19 letter that that rate of \$.41 had never applied to self-unloaders. Penn Central closed the letter with the statement that the district court read as evidence of misrepresentation:

As I have indicated to your Company before, we are ready at any time to join with you in attempting to improve the facilities and resolve the cost problems involved in lake-rail movements of iron ore and pellets.

Defendants argue that this "conclusory expression of good will cannot, without more, constitute evidence of active con-

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cealment of the alleged railroad conspiracy." We are compelled to agree. No reasonable person could read this letter in its context as anything other than a stiff rebuff of Litton's protest.

Further, defendants argue that the record shows that Litton was not misled by Penn Central's expression of good will. We agree. It was error to conclude otherwise upon this record.

The district court ruled that there existed a question of fact as to whether Litton knew of the facts constituting its cause of action before the statute of limitations expired. Some of the evidence at issue concerns the railroads' setting handling charges together. In March 1970 one Andberg, the president of a Litton subsidiary, told Preisser that the "[r]ailroads are meeting next week to discuss rate and future position." In an undated letter, Andberg said that he was told that Litton "could have difficulties with the railroads banding against [it]." Also, Andberg testified in a deposition that "it was common knowledge to me before I ever went to work for Wilson [the Litton subsidiary] that the railroads didn't want self-unloaders delivering iron ore." *Id.* Preisser knew that Sandmann, before their meeting on April 30, 1971, was planning to meet with other railroads "to discuss their terminal strategy on the Great Lakes and the relationship of that strategy to the new jumbo self-unloaders." In the same file memorandum Preisser described another conversation in which he had said that "we would not like the idea of the railroads colluding and/or meeting to determine their strategy on lake transfer terminals."

Andberg gave the following testimony in a deposition. When he was told that the railroads were banding against Litton, he "didn't know really" what that meant. He was aware of the rate bureau meetings but he "was not aware that they had meetings after their rate meetings and collectively got together" to make decisions directed against Litton. Preisser testified similarly:

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There were . . . ratemaking bureaus and rate filings which were published; and I presumed if they were having a meeting and they were going to discuss rates, they would do so in, you know, the proper form, whether it was at rate bureau meetings or public filing of a rate change or decision.

The district court held that there was an issue of fact as to whether Litton knew that the railroads acted collectively apart from rate bureau meetings.

On April 30, 1971 Sandmann told Preisser that C&O/B&O would not give Litton a lower handling charge for self-unloaders. After the meeting Preisser said that Sandmann "was intimidated by the other railroads and capitulated. He will not offer us an advantageous rate over their existing docks." In June 1971 Andberg was told that if C&O/B&O reduced its charges, "Penn Central would equalize. This would start a rate war."

Preisser testified about what he meant by his comment that Sandmann was intimidated:

[H]e may have been intimidated by the other railroads' financial power, their responsiveness, their engineering, their car fleet size, the rapidity with which they could move and update their docks, arrangements which they might proceed to enter into with American Ship Building or some other Lake transportation carrier.

Plaintiffs argued in the district court that when they heard that Penn Central would match any reduction in C&O/B&O's handling charges, plaintiffs thought this meant that the railroads were willing to compete with each other, not that they were conspiring against Litton.

The district court held that Litton indeed might have understood Penn Central's threat "as a sign of competition

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and not collusion." As for the meeting in which Sandmann succumbed to the other railroads' pressure, the court stated:

Even if plaintiffs knew that defendants met *privately* on April 29, this is not as a matter of law the equivalent of plaintiffs having knowledge that defendants had previously entered into and were furthering their alleged conspiracy to restrain the use and development of self-unloaders. Further, it may be found, as Preisser testified, that when he stated Sandmann was "intimidated" by the April 29 meeting, Preisser was referring to natural economic pressures rather than pressure resulting from a conspiracy

When Preisser became aware of Sandmann's meeting with the other railroads on April 29, 1971, Preisser knew in defendants' words "that the defendants were acting jointly to Litton's detriment with respect to handling charges," and should have suspected and investigated a possible conspiracy. As we have described above, on April 30, 1971 Sandmann and Preisser discussed C&O/B&O's handling charges and the possibility of Litton's leasing C&O/B&O dock facilities. The district court held that this meeting and other negotiations continuing through mid-1972 may have reasonably deterred Litton from investigating any suspicion of a conspiracy.

Once again our review of the evidence satisfies us that even if the defendants might conceivably have misled Litton initially, no reasonable person in the position of Litton could have long relied on such impressions nor have been dissuaded from exercising due diligence in investigating possible anti-trust liability within the statutory period.

In conclusion, while we could properly have declined to address the statute of limitations issue upon the basis that a lenient standard of abuse of discretion applies to the denial of motions for summary judgment, we have concluded that the principles of *Alexander v. Aero Lodge*, 565 F.2d 1364,

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strongly counselled us to reach and decide this issue. There was as much before the district court and before us as there is likely ever to be. And since we conclude that no genuine issue of fact exists to warrant the tolling of the federal four year statute of limitations, the task for the parties and the court will be substantially lessened by our so ruling at this juncture. In short, therefore, the plaintiffs are limited in their proof of federal antitrust violations to conduct occurring within four years of their commencement of action.

As we shall shortly illustrate, we realize that this ruling does not affect plaintiffs' cause of action under the Valentine Act. The impact of our ruling will be summarized in the "conclusion" section of this opinion.

VII. PREEMPTION OF OHIO'S NO-LIMITATION STATUTE

Ohio Revised Code § 1331.12 provides: "No statute of limitation shall prevent or be a bar to any suit or proceeding for any violation of" Ohio's antitrust law, the Valentine Act, Ohio Rev. Code §§ 1331.01-1331.14. Federal antitrust actions are limited by the four-year period of section 4B of the Clayton Act, 15 U.S.C. § 15b. Plaintiffs appeal the district court's ruling that section 4B preempts application of section 1331.12 to pendent claims that are brought under the Valentine Act and could be brought under federal antitrust law if not for the statute of limitations.

The standards for deciding a preemption question are well established. State law in a given field can be preempted either entirely or to the extent that it conflicts with federal law. A conflict between state and federal law arises when "compliance with both federal and state regulations is a physical impossibility," . . . or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713

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(1985) (citations omitted). See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977).

In the present case there is no suggestion that Congress has preempted the entire field of antitrust regulation or that it is impossible to comply with both federal and Ohio law. The issue, then, is whether Ohio's no-limitation statute "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" in enacting a four-year statute of limitations.

Before the enactment of section 4B of the Clayton Act in 1955, there was no federal statute of limitations for antitrust claims, and courts borrowed analogous state limitation periods and applied them to federal claims. See *Chattanooga Foundry & Pipeworks v. Atlanta*, 203 U.S. 390 (1906). When Congress was considering the proposed section 4B, twenty-two of the forty-eight states were applying limitations periods of over four years. See S. Rep. No. 619, 84th Cong., 1st Sess., reprinted in 1955 U.S. Cong. & Admin. News 2328, 2331-32. Some states had enacted their own antitrust laws by then, and Congress presumably knew that courts might continue to apply statutes of limitation longer than four years to state claims. Congress' silence in the face of this possibility can be seen as acquiescence.

Ohio's no-limitation provision was itself in effect when section 4B was enacted. See Act of May 18, 1910, 101 Ohio Laws 274, 276 (1910). We cannot apply the normal presumption that Congress knew of the existence of the provision, see *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 414 (1973), because in fact Congress did not know of it. In 1952 a United States district judge in the Northern District of Ohio, ignoring the no-limitation provision, held that federal antitrust claims were governed by Ohio's six-year limitation on actions to enforce a liability created by statute. See *Reid v. Doubleday & Co.*, 109 F. Supp. 354 (N.D. Ohio 1952). The Senate Report, *supra*, at 2331, cited this case as the

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source for the Ohio statute of limitations applicable to anti-trust claims and did not cite the Valentine Act.

One apparent reason for enacting section 4B of the Clayton Act was that Congress at the same time enacted section 4A, 15 U.S.C. § 15a, which provides for antitrust damages actions by the United States. *See* Act of July 7, 1955, Pub. L. 84-137, 69 Stat. 282 (1955). These actions are also subject to the limitation period in section 4B, 15 U.S.C. § 15b. In allowing the federal government to sue for damages, Congress had good reasons to set a federal statute of limitations. If Congress had not set a federal statute of limitations, damage suits by the federal government would have been hampered in states having a limitation period of less than four years. Furthermore, it would look unfair for the federal government to sue one party and not another, when the conduct of both violated federal antitrust law but they operated in different states. Thus, enforcement of federal law would have justified enacting section 4B and leaving state limitation periods intact.

There are indications, however, that Congress might have intended to preempt state statutes of limitation. The Senate Report noted the following problems that inconsistent statutes cause:

- (1) Plaintiffs in different states injured by the same interstate conduct do not have the same opportunities to recover.
- (2) The plaintiff can shop for the forum with the longest statute of limitations, and "the defendant remains in constant jeopardy until the longest period of limitations has transpired."
- (3) When there is a choice between two states' statutes of limitation, the question of which state's law applies—that of the forum or that of the situs of the injury—creates confusion.

After setting out these problems, the Senate Report stated: "It is one of the primary purposes of this bill to put an end

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to the confusion and discrimination present under existing law" Senate Report, *supra*, at 2331.

The main reason for the district court's decision was that if state statutes of limitation are not preempted—a question that has arisen only recently and only in regard to Ohio, see *Ohio ex rel. Brown v. Klosterman French Baking Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,361 (S.D. Ohio 1976)—the confusion in choice of law may return along with differences in defendants' exposure time and plaintiffs' ability to recover.

We have very carefully considered the trial court's conclusion that Ohio's antitrust law, as provided under the Valentine Act, should be subject to the federal four-year limitation period notwithstanding Ohio's provision that no statute of limitation should be a bar to any proceeding for the violation of its antitrust law. The trial judge's ruling is appealing in many respects. Although we recognize the disadvantages which must inherently exist in a statute which is subject to no limitation, we are not convinced that the correct result was reached below.

Congress primarily focused on limiting federal antitrust actions. It was concerned that private enforcement of federal rights would be subject to a wide variety of state borrowing statutes. Congress was even more intent upon limiting the enforcement powers of the federal government itself. The establishment of a federal statute of limitations eliminated the possibility that federal enforcement would vary with the law of the jurisdiction in which the cause of action arose. We believe this is what the Senate Report was primarily addressing. Since Congress was well aware that there were state antitrust laws in effect and chose not to preempt them, we believe that neither did it intend to preempt anything in them, including statutes of limitations or provisions excluding them. We make no comment, of course, on what other constitutional, statutory or common law inhibitions there may be under Ohio law which might act as a bar to keeping

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such actions open in perpetuity. In short, to the extent to which the district court has pendent jurisdiction to adjudicate the rights of the parties under the Valentine Act, we hold that the four-year federal statute of limitations does not preempt Ohio Revised Code § 1331.12.

CONCLUSION

We harbor no illusions that we have resolved all of the problems which face the parties and the court in this extended litigation. Given the nature of the many rulings and the vagueness of the certification procedure employed both by the district court and by our court, we are not even certain that we have addressed all of the issues which arguably may have been included in the certification. To the extent the trial court and the parties are unable to glean any resolution of those unresolved questions that may have been certified, those questions are decertified.

Summarizing what we have reached here and decided on interlocutory appeal, we hold as follows:

(1) With regard to immunity under *Keogh* and under the Interstate Commerce Act all rate-related claims made by the plaintiffs, whether state or federal, must be dismissed.

(2) Following *Square D* and its disposition by the Supreme Court on remand, certain non-rate-related claims must survive, at least at this stage, and are therefore remanded to the district court for further proceedings, as follows:

(a) the claim that the defendants refused to permit Litton to purchase, lease or use dock facilities that could take self-unloaders;

(b) the claim that defendants used harassing tactics to try to forestall legitimate business activities of competitors [to the extent that this claim is not rate-related];

(c) the claim that defendants refused to handle self-unloading vessels at defendants' docks;

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- (d) plaintiffs' claim that defendants boycotted Pinney;
- (e) the claim that defendants divided markets; and
- (f) any other non-rate claim that plaintiffs might make by amendments, subject always of course to the exercise of its discretion in that regard by the trial court.

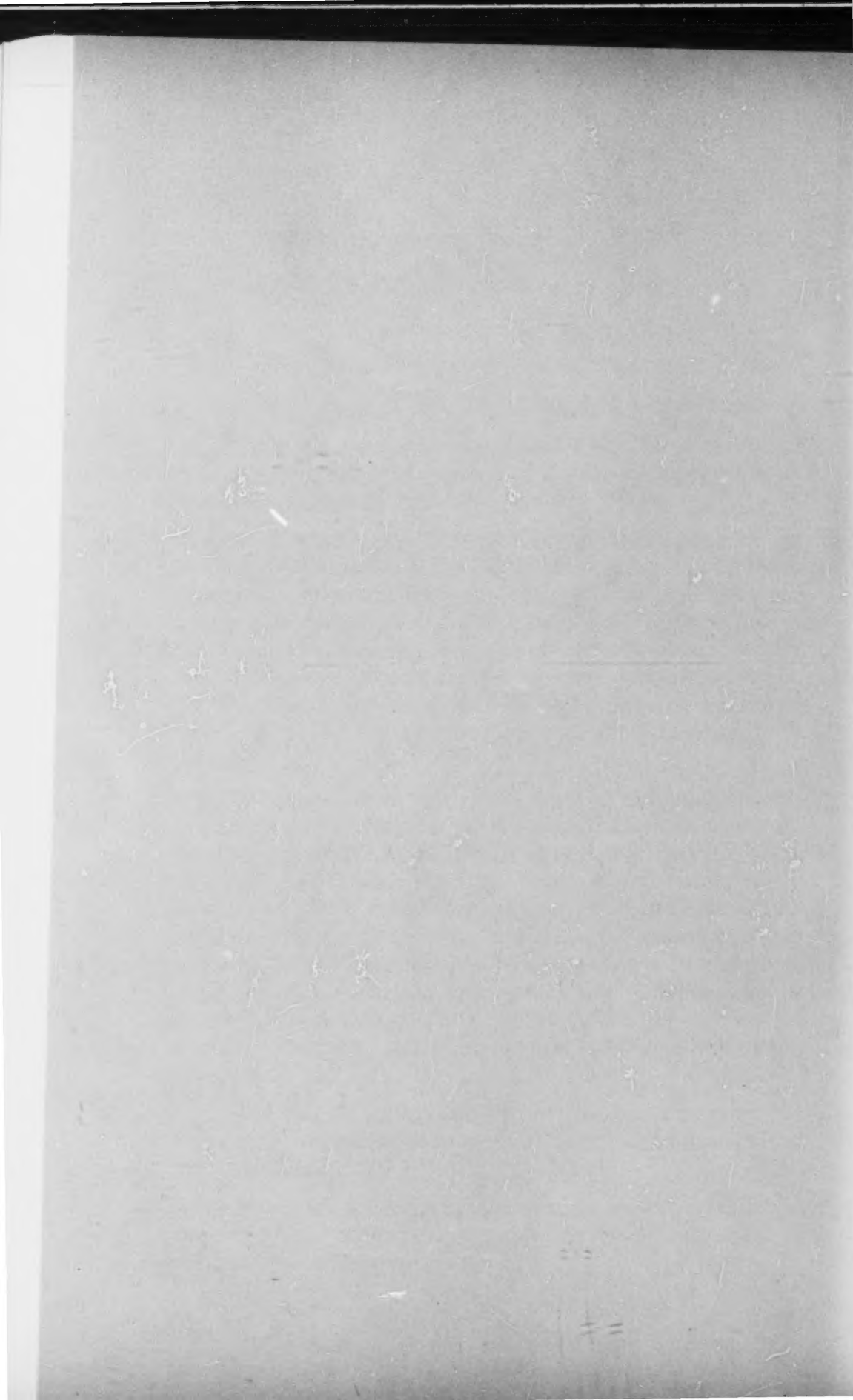
(3) With respect to standing, all rate-related claims except for Pinney's claim that defendants did not grant it a commodity line-haul rate, which were not raised on appeal, again are subject to dismissal on the alternate basis of standing. Further, claims (a) and (c), referring to the defendants' refusal to permit Litton to purchase, lease or use dock facilities and the defendants' refusal to handle self-unloading vessels at their own docks, are dismissed as to Pinney Dock in their entirety.

(4) The federal four-year statute bars all claims under federal law that occurred four years before the lawsuit was commenced. Plaintiffs' claim in that regard that accrual of the cause of action was tolled by fraudulent concealment is rejected because if in fact concealed, any such causes of action were nonetheless discovered or could with reasonable diligence have been discovered notwithstanding such a concealment and well within the appropriate time for commencing such actions. We do not hold that all claims are time-barred and the defendants' motion to dismiss on that has not sought such relief.

(5) The provision in Ohio's Valentine Act providing for no statute of limitations is not preempted by the federal four-year statute.

(6) All issues not otherwise addressed in this opinion are decertified and the case is remanded to the district court for further proceedings consistent herewith.

APPENDIX B



**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**NOS. 84-3653/3654
84-3876/3877**

PINNEY DOCK AND TRANSPORT CO.,
Plaintiff-Appellant
(84-3653),
Plaintiff-Cross Appellee
(84-3654),

and

LITTON INDUSTRIES, INC., et al.,
Plaintiff-Appellees
(84-3876),
Plaintiffs-Cross
Appellants
(84-3877),

v.

PENN CENTRAL CORP., et al.,
Defendants-Appellees
(84-3653),
Defendants-Cross
Appellants
(84-3654),
Defendants-Appellants
(84-3876),
Defendants-Cross
Appellees
(84 3877),

CHESAPEAKE & OHIO RAILROAD CO., et al.,
Defendants-Appellants
(84-3876),
Defendants-Cross
Appellees
(84-3477),

**Before: ENGEL AND KENNEDY, Circuit Judges;
and HIGGINS, District Judge.**

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjusted by this court that the judgment of the said district court in this case be and the same is hereby reversed in part and the case is remanded in part not inconsistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ **JOHN P. HEHMAN**

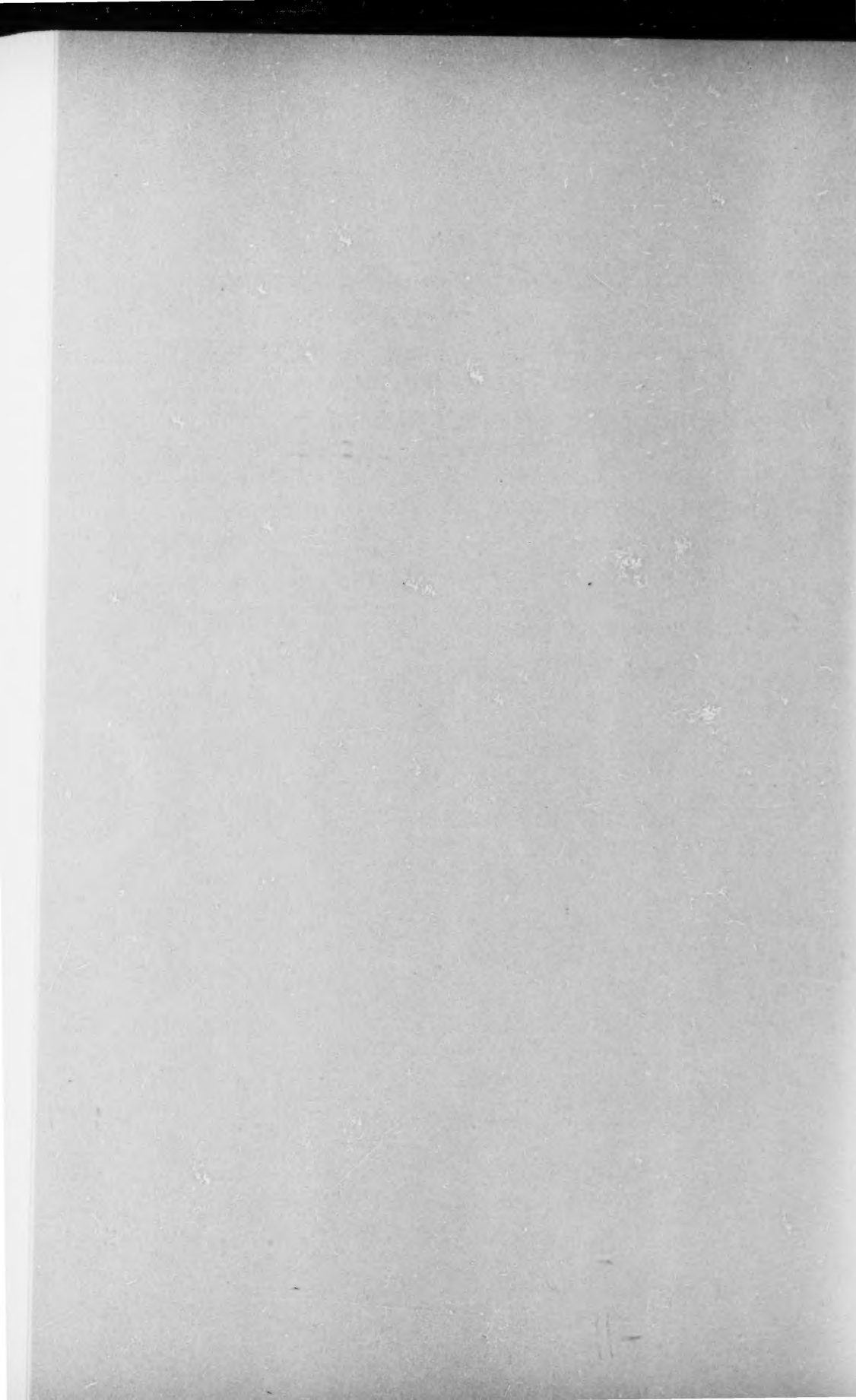
Clerk

ISSUED AS MANDATE:

April 21, 1988

COSTS: None

APPENDIX C



No. 84-3653/4/3876/7

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PINNEY DOCK & TRANSPORT CO.,

Plaintiff-Petitioner,

v.

**PENN CENTRAL CORP.,
THE CHESSIE SYSTEM CO., NEWS, INC.,
BESSEMER & LAKE ERIE RAILROAD CO.,**

Defendants-Respondents.

**BEFORE: ENGEL, Chief Judge, KENNEDY, Circuit Judge, and
HIGGINS*, United States District Judge**

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

April 13, 1988

John P. Hehman, Clerk

* Hon. Thomas A. Higgins sitting by designation from the Middle District of Tennessee.



APPENDIX D



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C80-1733

PINNEY DOCK & TRANSPORT COMPANY
Plaintiff

v.

PENN CENTRAL CORPORATION, *et al.*
Defendants and
Third-Party
Plaintiffs

v.

CONSOLIDATED RAIL CORPORATION
Third-Party
Defendant

MEMORANDUM AND ORDER

THOMAS, Senior Judge

In separate but related motions filed on April 15, 1982, defendants Baltimore & Ohio Railroad Company (B&O), Chesapeake & Ohio Railway Company (C&O), CSX Corporation, Chessie Systems, Inc. (sometimes collectively referred to as Chessie), Norfolk & Western Railway Company (N&W), and Bessemer & Lake Erie Railroad Company (B&LE) move to dismiss plaintiff Pinney Dock & Transport Company's (Pinney) complaint seeking damages for alleged

injuries to plaintiff's business and property caused by defendants' violations of sections 1 and 2 of the Sherman

Act, 15 U.S.C. §§ 1 and 2, section 3 of the Clayton Act, 15 U.S.C. § 14. . . . and Ohio's Valentine Act.¹

Each defendant argues that the alleged activities underlying plaintiff's claims are expressly and impliedly immunized from the antitrust laws by the Interstate Commerce Act (ICA), and that the Interstate Commerce Commission (ICC) has exclusive jurisdiction over the substance of plaintiff's claims. Each defendant additionally asserts that plaintiff's treble damage claims are barred by the doctrine of *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922). Defendant B&LE further contends that certain of plaintiff's claims should be dismissed either for lack of standing or "because they could not as a matter of law have caused direct or cognizable injury to plaintiffs." Finally, each defendant asserts that if this court does not dismiss plaintiff's complaint, "the case should be referred to the ICC under the doctrine of primary jurisdiction."

Since each of the parties has submitted factual exhibits in arguing the various issues, the court will apply Rule 56 of the Federal Rules of Civil Procedure's summary judgment standards. Defendants' motions will be granted only if "there is no genuine issue as to any material fact and [defendants are] entitled to a judgment as a matter of law."

Before analyzing the various branches of defendants' motions, it is essential to review the principal allegations in this antitrust case.

Plaintiff, an Ohio corporation, provides dock and terminal services in Ashtabula, Ohio for goods moving over the Great Lakes. In its first amended complaint, plaintiff alleges that "from at least the mid-1950's" the defendants conspired and acted to monopolize "the business of providing dock services for iron ore and other goods moving over docks on the lower Great Lakes, and the business of providing land transportation for iron ore and other goods moving over such docks." Plaintiff further alleges that defendants concomitantly conspired and acted to "restrain trade in the business of providing water

¹ The court does not address the related motion of defendant Penn Central Corporation at this time. See this court's memorandum and order of November 9, 1982.

carriage for iron ore and other goods moving over docks on the lower Great Lakes, and in the business of building ships for such carriage."

Plaintiff asserts that defendants advanced the ends of the alleged conspiracy through a series of overt acts and practices, some of which are specifically set forth in the first amended complaint. The alleged overt acts include refusing to grant a competitive rail rate for the carriage of iron ore from Pinney Dock, arbitrarily placing Pinney Dock in a switching district where it was ineligible for competitive rail rates, and imposing unjustifiably high switching charges on the cars of a railroad competitor which sought to carry iron ore from Pinney Dock at competitive rail rates. Defendants are additionally accused of "deliberately and purposefully foreclosing Pinney Dock's development as an iron ore handling facility by . . . preventing and postponing the construction and use of the self-unloading vessels which Pinney Dock was designed to serve."

Plaintiff maintains that the above alleged overt acts and practices (and others) were planned and carried out through a series of unauthorized secret meetings and discussions and that coercion and intimidation were used to

- (1) [force] railroads to forego their right of independent action with respect to rail rates and services and other matters;
- (2) [force] railroads not to serve self-unloading vessels at railroad-owned docks; and
- (3) [force] railroads not to lower their dock handling charges on iron ore.

Plaintiff charges that defendants' alleged antitrust violations have effectively stifled technological progress and development in the construction and use of efficient dock facilities and vessels and impeded and prevented the development of nonrail modes of land transportation. Additional effects allegedly resulting from the charged conspiracy are: (1) that shippers were subjected to artificially and unjustifiably high rates and charges for dock and land transport services; and (2) that needed improvements in the efficiency, economy and competitiveness of dock and transport facilities were subverted.

Plaintiff further states that

(a)s a direct and proximate result of the foregoing acts and violations, [plaintiff] has been greatly injured in its business and property because it was forestalled and excluded from participating in the business of providing dock services for various commodities, including iron ore, coal, and coke.

Plaintiff seeks treble damages under the federal antitrust laws and an order enjoining defendants from further violations of the federal and state antitrust laws.

I.

The court first addresses defendants' separate but parallel contentions that "the complaint should be dismissed because the matters at issue are within the exclusive jurisdiction of the Interstate Commerce Commission." Defendants argue that the Interstate Commerce Commission's pervasive regulation of railroad ratemaking activities supersedes the federal antitrust laws as to all "matters concerning the establishment of railroad rates." More precisely, defendants contend that the existence of the Interstate Commerce Act impliedly immunizes them from plaintiff's present antitrust action.

In support of their argument, defendants point out that the Interstate Commerce Act seeks to substitute collective action among the railroads under the supervision of the Interstate Commerce Commission for unrestrained competition between the railroads. Without question, the nature of the railroad industry necessitates collective action among competing carriers. For example, it is frequently necessary for one railroad to deliver freight to a destination located on the tracks of a competitor. Thus, under 49 U.S.C. § 1(4), the railroads are required to "provide and furnish transportation upon reasonable request therefore, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto. . . ." Sim-

ilarly, 49 U.S.C. § 1(10) and (11) mandate that railroads reasonable rules with respect to the interchange of locomotives, rail cars, and other railroad property.²

However, despite the need for cooperation between the railroads and notwithstanding the ICC's oversight of that cooperation, the Interstate Commerce Act does not necessarily provide an impermeable shield of implied immunity from the antitrust laws for the railroad industry. In *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682-83 (1975), the Supreme Court quoted language which has been oft repeated in the context of antitrust cases involving regulated industries:

Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied

With that language in mind, the court turns to the relevant case law.

In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), the state of Georgia filed an antitrust suit against approximately 20 railroad companies³ alleging that the defendants conspired to fix railroad rates so as to discriminate against the state of Georgia and that the defendants used coercion in the fixing of discriminatory joint through rates. After examining selected provisions of the Interstate Commerce Act, including 49 U.S.C.

² The Interstate Commerce Act, 49 U.S.C. § 1, *et seq.*, was recodified in 1978 as 49 U.S.C. § 10101, *et seq.* While that recodification was not intended to make any "substantive change in the law" (see section 3[a] of P.L. 94-473, 92 Stat. 1466), it extensively revised the structure and language of the Act. Moreover, beginning in 1976, Congress made substantive changes in the Act culminating in the Staggers Rail Act of 1980, 94 Stat. 1895. This court will cite to the pre-1978 version of the ICA since its provisions were in effect during most of the period covered by the complaint.

³ The suit was filed in Georgia's capacity as both *parens patriae* and as a proprietor to redress wrongs suffered by the state as the owner and operator of various other state institutions.

§§ 1(4) and 6, the Court addressed the defendants' contention that the ICC had exclusive jurisdiction over railroad rate cases. Unequivocally emphasizing that the railroads were "subject to the antitrust laws," *id.* at 456, the Court observed that "conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act" and that Congress had never adopted legislation legalizing rate-fixing combinations. Failing to find a "clear repugnancy" between the Sherman Act and the Interstate Commerce Act, the Court left it to Congress to statutorily create any antitrust immunity which the railroad industry needed to function efficiently.

Similarly, in *Carnation Co. v. Pacific Conference*, 383 U.S. 213 (1966), defendant shipping conferences argued that the Shipping Act "repealed all antitrust regulation of the rate-making activities of the shipping industry." Finding that the defendant associations of shipping companies unlawful rate-making activities were not expressly immunized from Sherman and Clayton Act coverage by section 15 of the Shipping Act, 46 U.S.C. § 814, the Court continued:

We do not believe that the remaining provisions of the Shipping Act can reasonably be construed as an implied repeal of all antitrust regulation of the shipping industry's rate-making activities . . . we have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts.

Id. at 217-18. The Court further observed that the express immunity language inserted into the Shipping Act by Congress must have been selected as a matter of deliberate choice in order to indicate the extent to which the

industry's rate-making activities remain subject to the antitrust laws as well as the extent to which those activities are exempted from antitrust regulation.

Id. at 219-20.

As with the Shipping Act, Congress has written an express immunity provision into the Interstate Commerce Act. Recognizing the need for cooperative activity among the railroads and responding in part to the Court's decision in *Georgia v. Pennsylvania R. Co.*, *supra*, Congress in 1948 amended the Interstate Commerce Act by adding 49 U.S.C. § 5b. See H.R. Rep. No. 1100, 80th Cong., 2nd Sess. 1845-1848, reprinted in 1948-2 U.S. Code Cong. & Ad. News 1844. Under section 5b, rail carriers are permitted to reach agreements as to rates, fares, classifications and a number of other railroad matters. 49 U.S.C. § 5(b)(9) provides that the railroads are "relieved from the operation of the antitrust laws with respect to the making of such [an] agreement and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the [Interstate Commerce] Commission."

This Court concludes that the "pervasive regulation of railroad ratemaking activities by the Interstate Commerce Commission" does not impliedly immunize all railroad rate-making activities from the antitrust laws. Any immunity which the defendants can invoke in this case must be found in the Interstate Commerce Act's express grant of antitrust immunity. To the scope and breadth of that immunity, attention is now turned.

II.

A.

Defendants argue that plaintiff's antitrust allegations are based upon coordinated ratemaking activities which were conducted in accordance with a joint ratemaking agreement expressly approved by the Interstate Commerce Commission. Defendants contend that their joint ratemaking activities are

expressly immunized from the antitrust laws by section 5a of the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, 49 U.S.C. § 5(b) (1948).

49 U.S.C. § 5(b)(9) expressly authorizes certain agreements between competing railroads relating to rates, classifications, and other transportation matters. The section also allows the participating railroads to establish rules, regulations and procedures for the joint consideration and implementation of rate schedules and classification systems, etc. When an agreement under this section is approved by the ICC, the participating railroads are expressly immunized

from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.⁴

⁴ 49 U.S.C. § 5(b)(2) sets the standard for ICC approval of an agreement among rail carriers:

Application to Commission for approval of agreements; rules and regulations

(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

(footnote continues)

Defendants in this case have jointly participated in a formal ICC approved eastern railroads rate bureau agreement since 1950. See Section 5a *Application No. 3, Eastern Railroads-Agreements*, 277 I.C.C. 279 (1950). Since the ICC approved agreement has (with minor modifications not relevant to this case) been in effect throughout the period of the alleged conspiracy, defendants argue that any rate actions they took which affected either Pinney Dock or iron ore traffic in general fell within the scope of section 5(b)(9)'s express grant

(footnote continued)

49 U.S.C. § 5(b)(9), the express immunity provision, provides in full:
Relief from operation of antitrust laws

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

The validity of the ICC approved *Eastern Railroads—Agreements, infra*, is not at issue in this case. Thus, none of the prohibitions in paragraphs (4), (5), and (6) set out below are claimed or found to be applicable. However, the plaintiff is not precluded from arguing that defendants agreed to forego their rights of independent action in violation of their agreement as part of a conspiracy to eliminate competition.

Agreements between carriers of different classes

(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipeline companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

Pooling or division agreements

(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this title is applicable.

Agreements for determining matters through joint consideration

(footnote continues)

of antitrust immunity. In response, plaintiff Pinney contends that defendants' conduct is not expressly immune under the Reed-Bulwinkle Act. Plaintiff urges that

[t]he group boycott charged in this case is not protected by the Reed-Bulwinkle Act and is unapprovable by the ICC. Section 5a [49 U.S.C. § 5b] does not immunize conspiracies which have the purpose and effect of eliminating a competitor.

In determining whether the activities of defendants alleged by the plaintiff fall within the scope of section 5(b)(9)'s express grant of antitrust immunity, this court's analysis must commence with a study of the statute itself.

B.

Defendants maintain that their argument is supported by the "statutory language." This court, however, reads that statute's language differently than defendants. Certainly, the making of the Eastern Railroads Agreement approved by the ICC in 1950 is immunized from the reach of the antitrust laws by 49 U.S.C. § 5(b)(9). Nonetheless, the issue confronting this court is whether the ICC's approval of the defendants' basic 5a agreement operates as either an express or implied approval of a later "agreement" to eliminate a competitor and monopolize a market. Nothing in the actual language of section 5(b)(9) set forth earlier either suggests that it does or permits that implication.

Nonetheless, defendants argue that apart from the language of section 5(b)(9), "the structure of section 5a suggests that there is no need to create a predatory intent exception because such complaints are covered by the ICC's regulation."

(footnote continued)

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

In support of this argument, defendants correctly observe that under 49 U.S.C. § 5(b)(2) the ICC only approves those "agreements" which are "in furtherance of the national transportation policy." However, nothing in the present record indicates that the ICC ever "approved" or even was aware of defendants' alleged predatory conspiracy to boycott and eliminate plaintiff as a competitor. The 1950 Eastern Railroads Agreement, which merely establishes the procedures for discussing rate matters and reaching rate agreements, cannot be read as impliedly or expressly "approving" such a predatory conspiracy.

In an attempt to bolster their "structure" argument, defendants note that under 49 U.S.C. § 5(b)(7) the ICC is authorized to investigate and determine whether any agreement it has approved conforms with the terms and conditions upon which its approval was earlier granted. Moreover, the ICC can modify or terminate an existing agreement where necessary.⁵ But the conformance of the Eastern Railroads Agreement of 1950 to the ICC's requirements is not an issue in this case. The issue is whether defendants illegally conspired to boycott and eliminate a direct competitor so as to monopolize a market.

⁵ 49 U.S.C. § 5(b)(7) reads in full:

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2) of this section, or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

Paragraph 2 is set forth at p. 11, *supra*.

Nothing in the structure of the Interstate Commerce Act suggests that the ICC can approve such a conspiratorial agreement,⁶ or provide a remedy under the antitrust laws for the damages resulting from one. See *Carnation Co. v. Pacific Conference*, 383 U.S. 213, 224 (1966).

Defendants additionally point to 49 U.S.C. § 15(a)(3) and argue that its language is "inconsistent" with applying the antitrust laws to rail carriers. Defendants cite the portion of section 15(a)(3) which states:

Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy

Section 15(a)(3) only ensures that the ICC will not disallow a reduced rail rate merely because it could potentially divert traffic away from competing modes of transportation such as trucks or airplanes. See *ICC v. New York, New Haven & Hartford Railroad*, 372 U.S. 744 (1963). Section 15(a)(3) cannot in any way be read as stating that the ICC's approval of a 5a agreement shields a subsequent conspiracy to eliminate a direct competitor from the antitrust laws.

The court therefore concludes that neither the actual language of 49 U.S.C. § 5(b)(9) nor the structure of section 5a as a whole can be read as shielding the conspiracy alleged by plaintiff from the antitrust laws.

⁶ Indeed, in *Iron Ore Rate Cases*, 44 I.C.C. 368, 376 (1917), the ICC discussed the issue of dock rates for iron ore at Lake Erie ports and observed:

It is of course in the interest of the carriers that the ore should move over their own docks, since the cost per ton for overhead expenses tends to decrease as the tonnage handled over the docks increases; *but the right of the shippers or others to operate docks of their own can not be denied*, and if they can perform the service at a less cost per ton than the carriers charge, of it they elect to assess a lower charge for the service than the maximum allowed to the carriers, these are matters with which, as the situation is now understood, we are not concerned. . . . Any service performed by the private docks in the way of loading, handling or storing the ore prior to the time of shipment is a matter to be disposed of between the dock and the shipper of ore. [Emphasis added.]

C.

Defendants argue that the legislative history of the Reed-Bulwinkle Act illustrates "that Congress did not contemplate a predatory intent exception to section 5a because plenary and exclusive regulation of collective ratemaking, including control of any predatory conspiracies, was vested with the ICC."

By way of background, joint railroad bureaus, associations, committees and conferences existed in large numbers before the passage of section 5(b), the Reed-Bulwinkle Amendment. See H.R. Rep. No. 1100, 80th Cong., 2nd Sess., reprinted in 1948 U.S. Code Cong. & Ad. News, 1844-1845. Cooperative action among the railroads was recognized by Congress as critical for integrating the country's railroad into a single efficient shipping network. For instance, "carriers could not be expected to adjust their rates intelligently so as to fulfill the requirements of the [Interstate Commerce Act] unless they were permitted to organize. . . ." *Id.* at 1849. As the House Report states:

The carriers cannot effectively meet the requirements of the law, or provide the type of transportation that the public has come to expect and demand of them, if each is to be compelled to go it alone without a reasonable degree of consultation and agreement with other carriers. . . .

Id. at 1851. The Reed-Bulwinkle Amendment was seen as necessary to ensure that the railroads could engage in cooperative ratemaking without fear that their activities might be subject to prosecution under the antitrust laws. To reach a proper accommodation between the antitrust laws and the national transportation policy, Congress provided that

rate conferences, when approved by the ICC, and whose rate decisions are under final control of the ICC, shall not be subject to the antitrust laws with respect to the making and carrying out of such agreement in conformity with the Commission's requirements.

Remarks of Representative Bulwinkle, 94 Cong. Rec. Append. 4032 (1948).

Defendants contend that the congressional debates "leave no doubt that I.C.C. approval of a 5a agreement was intended to confer absolute antitrust immunity." Defendants point to colloquies such as the following to support their argument:

MR. WHITE: Is it not true that for many years the Congress has over and over again directed that the procedure should be through the regulatory body and by means of the regulatory process, rather than through indictment in the courts for violation of the antitrust statutes?

MR. REED: Yes; the whole procedure has been through the strengthening of regulations, rather than to use the severe and sometimes arbitrary methods of proceeding under the antitrust act.

43 Cong. Rec. 6594 (June 9, 1947).

Although such colloquies lend support to defendants' position, the legislative history must be read in its full context. At no point in time did either Senator Reed or Representative Bulwinkle say that the bill would blanket the railroads with absolute antitrust immunity. Indeed, their consistent remarks suggest the opposite. Throughout the Senate hearings, opponents of the amendment, including Senator Russell of Georgia and others, argued that its passage would completely immunize the railroads from the reach of the antitrust laws. Senator Reed steadfastly rejected this position. The following exchanges are illustrative:

[Referring to a report of the Senate Small Business Committee, co-authored by one of its employees, Mr. Childe]

Mr. SPARKMAN. I know Mr. Childe, and have a very high regard for him. I am particularly interested in seeing his testimony in the volume before us. I should like to read a little further from the testimony, where he says this:

However, I do not believe there is any necessity or reason for relieving carriers from liability under the antitrust laws.

That is Mr. Childe's testimony, and if I understand correctly, the pending bill does that very thing.

Mr. RUSSELL. That is the purpose of it.

Mr. SPARKMAN. That is Mr. Childe's testimony.

Mr. REED. Mr. President, will the Senator from Georgia yield? I should like to submit a little more of the testimony.

Mr. RUSSELL. I want to get along; but I yield. Continuing with Mr. Childe's testimony, Senator Reed read:

I believe that the rate committees and other conferences of the carriers should be regulated by the Interstate Commerce Commission to make them more effective in the public interest and to guard against abuses, and that the antitrust laws should remain in full force and effect, as a protection against any combinations or conspiracies for unlawful purposes.

The CHAIRMAN. Let me ask you there— in one breath you say they should be under the supervision or regulatory power of the Interstate Commerce Commission; and in the next you say they should be subject to prosecution under the Sherman antitrust law. Of course, these two things are inconsistent for the simple reason that if you say they can make an agreement, regulated by the Interstate Commerce Commission, the Government could not prosecute them under the Sherman antitrust law unless coercion could be shown:

Mr. CHILDE. That is true. I think prosecution under the antitrust law should be against collusive practices for unlawful purposes.

Senator Reed then added: "With that I agree." 93 Cong. Rec. 6613-14 (1947).

Senator Reed later continued:

Mr. President, the merits of this bill require consideration by the Congress, regardless of the pending antitrust litigation against the railroads.

This bill is prospective in its operation and does not have the effect of giving the railroads immunity for anything illegal that they may have done in the past.

Georgia's suit in the Supreme Court against the railroads is a suit that charges the railroads with having combined and conspired to fix rates, by coercion, that discriminate against Georgia.

He then emphasized:

This bill does not give any immunity to any coercive combination. Paragraph 6 leaves such a combination subject to the antitrust laws, just as it is today.⁷

93 Cong. Rec. 7204 (1947).

⁷ At the time of the statement, paragraph 6 of S.110, the Senate Bill, contained the following language inserted at the behest of Senator Russell:

Nothing in this section and no approval of any agreement by the Commission under this section shall be so construed as in any manner to remove from the purview of the antitrust laws any restraint upon the right of independent action by means of boycott, duress, or intimidation.

This language was removed by the House Conference Committee before passage of the final bill. The legislative history is barren of specific reasons as to why this language was removed. Hence, no legislative intent may be inferred from the removal of Senator Russell's amendment to the Senate bill. But it appears from the following exchange with Senator O'Mahoney (Montana) that Senator Reed felt that the Russell amendment was not needed:

Mr. O'MAHONEY. Just another quotation, with the Senator's indulgence. This was an amendment which was inserted by

(footnote continues)

A somewhat similar colloquy occurred during the course of an argument over whether the case of *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) (see p. 7, *supra*) would be mooted by passage of the amendment:

Mr. McFARLAND. The Department of Justice informed the Senator from Arizona that so far as the rate part of that case is concerned it will do away with it. Where does the Senator get his information?

(footnote continued)

the Senate in order to make sure that no conspiracies would be permitted under the Bulwinkle-Reed bill. I read from paragraph (6):

Nothing in this section and no approval of any agreement by the Commission under this section shall be so construed as in any manner to remove from the purview of the antitrust laws any restraint upon the right of independent action by any carrier by means of boycott, duress, or intimidation.

In other words, the Senate said there should be no approval of any device by which boycott, duress, or intimidation should be applied to any carrier. The conference eliminated that amendment. Is that the way to prevent conspiracy?

Mr. REED. When some useless language is inserted in a bill for political purposes, and accepted by the Senator in charge of the bill at the end of 5 days' debate in order to get the bill through the Senate, and the conferees on the part of the House say, "If you expect us to consider that kind of bunk seriously you are mistaken."

Mr. O'MAHONEY. Does the Senator say it is useless to prevent boycott, coercion, or intimidation, and can it be prohibited when exemption is being granted from the law which enforces it?

Mr. REED. Of course we are not granting any exemption. The constant misstatements of the Senator from Wyoming—I wish he would make them in his own time—

Mr. O'MAHONEY. There is no limitation on debate.

Mr. REED. No; and certainly the Senator from Wyoming exercises his privilege very freely in that respect.

Mr. O'MAHONEY. Does the Senator object to being catechised on this subject?

Mr. REED. It would not do any good to object to the Senator from Wyoming utilizing his privilege as a Senator.

(footnote continues)

Is it the result of his own analysis, or is it from the attorneys for the defendants in those cases?

Mr. REED. Mr. President, the case of the State of Georgia rests upon the allegation of a conspiracy between the railroads to establish rates which were illegal because discriminatory. The bill has no relation at all to any case that rests upon conspiracy. The bill, if enacted into law as I firmly believe it will be today, will not affect the Georgia case or the Lincoln case in the slightest degree.

Additional portions of the legislative history further reveal that the authors of the amendment never intended it to put conspiracies to drive competitors out of business beyond the reach of the antitrust laws.⁸ For example, after the final bill was passed in both Houses over the veto of President Truman, Representative Bulwinkle addressed the House with the "desire

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Mr. O'MAHONEY. The Senator can substitute personalities for argument, and I have no objection to that, because I know the RECORD will show that personalities cannot outweigh the facts. The facts are that the Senate put in the bill a prohibition against boycott, intimidation, and coercion, and the conferees took it out.

Mr. REED. It is in the law, anyway.

Mr. O'MAHONEY. Where?

Mr. REED. I shall call attention to it later. I ask the Senator from Wyoming to permit me to complete my statement, and then make his speech and make his statements, including his misstatements, in his own time.

Mr. O'MAHONEY. Will the Senator be good enough to point out my misstatements?

Mr. REED. I do not yield.

94 Cong. Rec. 8417 (1948).

⁸ The court accords greater weight to the statements of the bill's authors as to the scope and breadth of the bill than to the assertions of the bill's opponents that its adoption would permit the railroads to engage in "boycott[s], coercion, or intimidation." The opponents' warnings do not override

(footnote continues)

to state what the law will do and what it will not do." 94 Cong. Rec. Append. 4032 (1948). Firmly stating that the amendment would not moot the charge in *Georgia v. Pennsylvania R. Co.*, *supra*, that certain railroads had violated the antitrust laws, Representative Bulwinkle stated:

The charge made against the railroads in the Georgia case is that they combined and conspired to fix rates by coercion and to discriminate against Georgia. *A combination or conspiracy of that kind would not be protected or immunized by S. 110.* [Emphasis added.]⁹

(footnote continued)

the intent of the bill's framers. As the Supreme Court stated in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-95 (1951):

The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

Similarly, in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204, n.24 (1976), the court observed:

Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. See e.g., *United States v. United Mine Workers*, 330 U.S. 258, 276-277 (1947); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). This is especially so with regard to the statements of legislative opponents who "[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach." *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964). See, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951).

⁹ Representative Bulwinkle continued:

The conspiracy charged by the State of Georgia is a conspiracy to fix rates by coercion and to discriminate against the State of Georgia in the rates so fixed. This is the way the Supreme Court construed Georgia's pleading; it was this kind of a cause of action that the Supreme Court permitted the State to bring

The Supreme Court in its opinion granting the State of Georgia leave to file its amended bill of complaint held that a certificate issued under a statutory provision similar to S. 110 did not prevent the Court from granting the State of Georgia equitable relief if the State could prove its charges. This holding was made with respect to the effect of certificate 44 which had been

(footnote continues)

Moreover, the final House and Senate Reports observed:

The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

H.R. Rep. No. 110, 80th Cong., 2nd Sess., reprinted in 1948 U.S. Code Cong. & Ad. News, 1848.

These excerpts from the legislative history contradict defendants' contention that the Reed-Bulwinkle Amendment was

(footnote continued)

issued under section 12 of the act of June 11, 1942. The provisions of that act were analogous to the provisions of S. 110. The act authorized the Chairman of the War Production Board to issue certificates which provided that the antitrust law should not apply to certain kinds of activity which were found by the Chairman of the War Production Board to be requisite to the prosecution of the war. Such a certificate had been issued by the Chairman of the War Production Board with respect to the rate conferences and committees involved in the Georgia case. The Supreme Court held that this certificate did not prevent the State of Georgia from bringing suit in the Supreme Court. Speaking of certificate 44 the Court said:

It does not sanction the use of coercion. It does not authorize any combination to discriminate against a region in the establishment of rates. (*Georgia v. Pennsylvania R. Co.*, (324 U.S. 430, 459), footnote 7.)

This holding of the Supreme Court is a decisive answer to the suggestion that if S. 110 becomes law the Georgia case will be moot and the Supreme Court will be prevented from granting relief to the State of Georgia.

It follows that if the State of Georgia can prove that, in fact, the railroads have combined and conspired to fix rates by coercion and to discriminate against the State of Georgia, nothing in S. 110 will prevent the Supreme Court from issuing an injunction that prohibits the railroads from engaging in that kind of activity.

94 Cong. Rec. Append. 4033-34 (1948).

enacted with the intent of conferring absolute antitrust immunity upon railroads who are signatories to a 5a agreement. The Legislative history, read as a whole, strongly suggests that the Reed-Bulwinkle Amendment's authors never envisioned its grant of antitrust immunity as being absolute. As a result, this court is unable to embrace defendants' assertion that the legislative history "leaves no doubt" that approval of a section 5a agreement by the ICC necessarily confers antitrust immunity upon signatories who conspire to eliminate a competitor.

D.

The court now turns to the relevant case law cited by each side to support their respective positions. In support of its argument against defendants' motions, plaintiff cites several cases. Plaintiff's lead case is *Atchison, Topeka & Santa Fe Railway v. Aircoach Transportation Association*, 253 F.2d 877 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960).

In *Aircoach*, four supplemental air carriers and the transportation association to which they belonged sued forty railroads and two rate committees for treble antitrust damages and an injunction. Plaintiffs alleged that two specific practices of the railroads in connection with their charges for United States military traffic violated sections 1 and 2 of the Sherman Act. The practices included the railroads' concerted quotations of "variable spot bids" for military traffic at rates below their published schedules, and the making of "package bids" in which the railroads agreed to carry military personnel only on an "all or nothing" or "package" basis.

The defendants argued that their rate quotations "were made pursuant to section 22 of the Interstate Commerce Act and [were] immunized from the operation of the antitrust laws by an agreement approved by the Interstate Commerce Commission pursuant to section 5a of that Act." *Id.* at 880. The district court ruled that section 22 rate quotations were excluded from section 5a agreements and, therefore, left unprotected from the antitrust laws. The D.C. Circuit reversed the ruling and held that section 22 rate activities, like other commercial

railroad rate activities, were in certain circumstances entitled to express antitrust immunity protection under 49 U.S.C. § 5(b)(9). The court remanded the case to the district court with instructions to initially submit the case to the ICC to determine whether the activities at issue were carried out pursuant to the railroads' section 5a agreements.

In instructing the district court to initially submit the case to the ICC, the circuit court attached a critical condition to its order. The court stated:

One further substantive legal question must be considered. Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9). We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purpose of eliminating the competition of Aircoach for the section 22 transportation involved.

Id. at 887. The court further stated that "this aspect of the case need not be submitted for consideration or initial decision by the Commission as to either questions of fact or law." *Id.* If Aircoach prevailed on this aspect of the case, defendants "would be liable in damages, and an appropriate injunction also could be granted." *Id.*

Aircoach was immediately followed by *Riss & Company v. Association of American Railroads*, 170 F. Supp. 354 (D.D.C. 1959), *cert. denied*, 361 U.S. 804 (1959). *Riss* involved a suit by a trucking company against first class railroads for allegedly conspiring to destroy the trucking company's business and to acquire a monopoly of land transportation of property in the United States. The railroads argued that the case involved ratemaking over which the ICC had primary jurisdiction.

Defendants argued that their rates had been approved by the ICC, and were immune from the antitrust laws under 49 U.S.C. § 5(b)(9).

The *Riss* court pursued the path laid down in *Aircoach*:

It is clear from the . . . language in the ACTA case that a court need not refer to the Commission the issue of whether a rate quotation was made as a part of a combination or conspiracy to eliminate a competitor. This follows logically because such a joint act if combined with the unlawful intent of eliminating a competitor would fall outside of the immunity granted by 49 U.S.C. § 5(b)(9) regardless of a possible I.C.C. ruling that the methods of arriving at the new rate conformed to prior procedural agreements filed with and sanctioned by the Commission.

170 F. Supp. at 362. Summarizing, the court stated:

. . . if it should develop at trial that the plaintiff can prove that the rate reduction . . . was one of several overt acts alleged, and prove this rate reduction was made for the purpose of effectuating one of the principal objects of the conspiracy charged therein; that is, the elimination of plaintiff as a competitor with the railroads for explosives traffic, then under ACTA no amount of coverage by approved agreements and no degree of immunity under 49 U.S.C.A. § 5(b)(9) could remove the rate reduction from the prohibitions of the Sherman Act . . . it would seem that the antitrust immunity that defendants invoke was designed to protect ordinary rate-making in the course of regular business so as to adjust to changing costs and to meet the challenges of outside competition. . . . Even if a given joint act of reducing rates were to be considered as lawful standing by itself, it may still be properly alleged as one of the means used to effectuate a conspiracy to accomplish an unlawful object.

Id. at 366.

Thus, *Aircoach* and *Riss* do not attack regulated rates in and of themselves; they assail predatory conspiracies to eliminate competition within regulated industries. Nevertheless, defendants launch a direct assault on *Aircoach*. They argue that the D.C. Circuit cited no direct authority for its "remarkable revision of the clear language of the [Interstate Commerce] Act." As seen, however, the actual language of the Reed-Bulwinkle Amendment cannot be read as shielding conspiracies to eliminate competitors from the antitrust laws. Moreover, the citation of authority in *Aircoach* confirms that the decision stands upon solid ground.

The court in *Aircoach* cited *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) as a leading authority for its proposition that neither the Interstate Commerce Act nor any agreement approved under it can be construed as shielding from the antitrust laws conspiratorial conduct undertaken to eliminate a competitor. 253 F.2d at 887. In *Georgia*, the Supreme Court grappled with defendants' contention that a discriminatory conspiracy carried out through the coercive fixing of rates was shielded from the antitrust laws by an immunity provision similar to 49 U.S.C. § 5(b)(9). In a footnote, the Court observed:

We have considered the argument that Certificate No. 44, issued March 20, 1943 under § 12 of the Act of June 11, 1942 (56 Stat. 357) by the Chairman of the War Production Board (8 Fed. Reg. 3804) protects this alleged combination from the charges contained in the bill. That certificate approves joint action by common carriers through rate bureaus and the like in the initiation and establishment of rates. We do not stop to analyze it beyond observing that in no respect would it be a bar to the present action. It does not purport to be retroactive. It does not sanction the use of coercion. It does not authorize any combination to discriminate against a region in the establishment of rates. Moreover, legal means may be employed for an illegal end.

324 U.S. 459, n.7. The *Aircoach* court's reliance on *Georgia* was correct because as previously shown, *Georgia* continued to represent binding precedent after the passage of the Reed-Bulwinkle Amendment. See p. 26, *supra*.

The *Aircoach* court also relied on the persuasive legal analysis in *Slick Airways v. American Airlines*, 107 F. Supp. 199 (D.N.J. 1952), *appeal dismissed sub nom., American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953). In *Slick*, plaintiff alleged that defendant American conspired with other airlines to drive it out of business in order to monopolize the business of air freight transportation. Plaintiff maintained that as part of a conspiratorial campaign, defendants engaged in a series of predatory rate activities. Similar to the Interstate Commerce Act, the Civil Aeronautics Act provides express antitrust immunity for air carriers carrying out any acts authorized, approved, or required under an agreement filed with the Civil Aeronautics Board. As in this case, defendants contended that the alleged combination and conspiracy was immunized by an agreement which had been approved by the CAB. But the court did not "concur with the suggestion that a conspiracy to drive a competitor out of business . . . is the type of agreement encompassed within the statute and subject to the primary jurisdiction of the CAB for approval or disapproval and for possible immunity from the antitrust laws." *Id.* at 207. The court explained:

The defendants misconceive the nature of the complaint by confusing the means allegedly used with the result to be achieved. They view the complaint as alleging combinations or conspiracies to waste the resources of the plaintiff through predatory rate policies, to abuse the privilege of intervention in CAB proceedings, and to conduct a campaign of unfair competitive practices which amount to contracts and agreements within the purview of § 492. It is in this that they fall into error for these alleged acts rather constituted the means and methods by which the defendants conspired to drive the plaintiff out of business in violation of the anti-trust laws. As the

Supreme Court said in *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S.Ct. 1125, 1139, 90 L. Ed. 1575: "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."

Id.

Several recent cases have applied an *Aircoach* type analysis in regulated industry antitrust suits. For example, *BBD Transportation Co. v. U.S. Steel Corp.*, 1976-2 Tr.C. (CCH) ¶61,079 (N.D. Col. 1976), held that a plaintiff motor carrier's allegations that defendant steel companies and railroads conspired to reduce railroad rates in order to force the trucking industry to lower its rates could not be eliminated on a motion for summary judgment. The allegations, the court stated, "[i]f eventually proven to be true . . . would strip away immunity otherwise conferred by 49 U.S.C. § 5b(9)." *Id.* at p. 69,873. Similarly, *United States v. Baltimore & Ohio R.R.*, 538 F. Supp. 200 (D.D.C. 1982), the criminal analogue of the present case, adopted *Aircoach's* holding that "section 5a immunizes the collusive making of rates but does not immunize the collusive making of rates which are intended to eliminate competition." *Id.* at 207-08.¹⁰

¹⁰ The *Aircoach* reasoning has been applied in the context of a variety of other regulated industries. For example, see *U.S. v. Braniff Airways, Inc.*, 453 F. Supp. 724 (W.D. Tex. 1978) (conspiracy to eliminate an air competitor not immunized by the Federal Aviation Act's express immunity provision), and *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203 (9th Cir. 1973), cert. denied, 417 U.S. 913 (1974). Also see *United States v. American Telephone & Telegraph Co.*, 461 F. Supp. 1314, 1328-29 (D.D.C. 1978), in which the court ruled:

The court now turns to defendants' contention that "the better reasoned cases hold that lawsuits charging railroads with predatory ratemaking are precluded by § 5a." As their lead case, defendants cite *Asbury Graphite, Inc. of California v. Dehyco Co.*, 1981-1 Tr. C. (CCH) ¶ 63,980 (N.D. Cal. 1980). In *Asbury*, the court confronted a claim by a processor of furfural residue that another processor had conspired with ten railroads to monopolize the market in the Pacific Northwest by means of a railroad tariff allegedly favoring the competitor. The court ruled that 49 U.S.C. §10706, which now replaces section 5(b) (see n.2, *supra*), "on its face" immunized the defendants from the antitrust laws:

Even if the ratemaking were actually "conspiratorial" and "monopolistic," as alleged, since it unquestionably took place within the context of amending an approved freight bureau rate, the antitrust laws are inapplicable.

Id. at p. 76,072.

The *Asbury* court based its decision upon its finding that the enactment of 49 U.S.C. § 5(b) resulted from an adverse

(footnote continued)

This complaint alleges a broad conspiracy to monopolize various aspects of the telecommunications industry through a symbiotic relationship among AT&T, Western Electric, Bell Labs, and the Bell Operating Companies (see p. 1350, *supra*). Even if it be assumed, *arguendo*, that the Commission exercised explicit regulatory authority over some segments of the activities challenged in the complaint, it does not follow that defendants are immune from antitrust liability even with respect to them. Defendants' purpose is alleged to be the monopolization of the telecommunications service and equipment market, and the bulk of their conduct, including that revolving around Western Electric and Bell Labs, cannot under any reasonable view be regarded as immune from antitrust enforcement by virtue of regulation. In that circumstance, the remainder of the challenged conduct is likewise subject to antitrust consideration, both because it constitutes a means for achieving an unlawful end *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 515, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), and because it represents one facet of a larger monopolistic scheme. [Citations omitted.]

Id. at 1329-30.

congressional reaction to *Georgia v. Pennsylvania R. Co.*, *supra*. As previously seen, this court does not read the legislative history or the words of 49 U.S.C. § 5(b)(9) as nullifying the impact of *Georgia v. Pennsylvania R. Co.*, *supra*. Nor does this court find persuasive the *Asbury* court's citation of *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). In *McLean*, a trucking company challenged under the antitrust laws an ICC approved merger of seven motor carrier companies. Since 49 U.S.C. § 5(11) expressly immunizes ICC approved mergers from the antitrust laws, the Court in *McLean* held that the Commission had the power to approve and thereby immunize a merger which might otherwise violate the antitrust laws. Consequently, the holding in *McLean* has little if any bearing on the issue of whether the ICC's approval of a section 5a railroad agreement completely shields from the antitrust laws signatory railroads that conspire to eliminate a competitor.¹¹ Therefore, this court finds the reasoning in *Asbury* to be unpersuasive.

¹¹ As noted in the House Report accompanying the Reed-Bulwinkle Amendment with respect to 5a agreements:

It is important to note . . . that in the case of a rate association, or any similar joint organization, it is not the rates or other collective actions resulting from the association procedures that the bill contemplates will be submitted by the carriers to the Commission for approval. What is to be submitted in such case is the basic agreement setting up the association and defining the nature and scope of its activities and its mode of procedures.

H. Report at p.1855. Unlike the plaintiff in *McLean*, plaintiff Pinney is not challenging the immunity of the ICC approved agreement. Rather, plaintiff alleges that the defendants acted outside of and contrary to the agreement by conspiring to eliminate it as a competitor and monopolize the industry.

For the reasons outlined, the court also finds *Interstate Investors, Inc. v. Transcontinental Bus Sys., Inc.*, 310 F. Supp. 1053 (S.D.N.Y. 1970), cited by the defendants, to be inapplicable to the present case. See also *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973), and *Pan American World Airways v. United States*, 371 U.S. 296 (1963).

Two additional cases cited by defendants as supporting the *Asbury* decision are also inapposite. In *Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 Tr. Cas. (CCH) § 75,282 (S.D.N.Y. 1974), plaintiff's antitrust claims were dismissed on the grounds that they were barred by *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). The *Keogh* doctrine and its applicability to this case are discussed in section III, *infra*.

(footnote continues)

Calling attention to antitrust cases raised in the context of other regulated industries, defendants argue that they are inconsistent with the holding in *Aircoach*. In *Dreisbach v. Murphy*, 658 F.2d 720 (9th Cir. 1981), plaintiff owner of a ship devanning facility in Los Angeles alleged that a rival devanner and three shipping companies conspired to boycott his company's services. Pursuant to a section 15 agreement,¹² the defendant carriers had agreed to exclusively use the devanning services of one of plaintiff Dreisbach's competitors.¹³ The court held that the joint choice of an exclusive devanning company was the type of "routine operating practice" within the scope of the carriers' FMC approved section 15 agreement. *Id.* at 729. It was, therefore, outside the reach of the antitrust laws. Because the Ninth Circuit found it "unnecessary to determine whether there was a conspiracy," *Id.* at 729, n.9, defendants argue that *Dreisbach* is inconsistent with the *Aircoach* ruling that "a purpose to destroy competition . . . would have the legal result

(footnote continued)

Baltimore & O.R. Co. v. New York, N.H. & H.R. Co., 196 F. Supp. 724 (S.D.N.Y. 1961), concerned a suit to recover per diem rental rates for the use by defendants of plaintiffs' freight cars. As a defense, defendants claimed that despite the existence of a binding contract, they were not bound to pay the contractual rate because plaintiffs had fixed the rates and forced defendants to pay them in violation of section 5A of the ICA and the Sherman Act. The court ruled that a finding by the Interstate Commerce Commission in a previous hearing that the plaintiffs had not engaged in the alleged activities precluded (under the doctrine of collateral estoppel) the defendants from relitigating the issue before the court.

Neither the *Monticello* court nor the *Baltimore & O.R. Co.* court ever addressed the immunity issue facing this court.

¹² Section 15 of the Shipping Act, 46 U.S.C. § 814, permits water carriers to file with the Federal Maritime Commission (FMC) agreements relating to rates and other matters. When an agreement is approved by the FMC, it is immunized against the operation of the antitrust laws. But see *Carnation Co. v. Pacific Conference*, 383 U.S. 213 (1966), and *In re Ocean Shipping Antitrust Litigation*, 500 F. Supp. 1235 (S.D.N.Y. 1980), for statements that section 15 antitrust immunity does not extend to the implementation of agreements unapproved by the FMC.

¹³ The court observed that "the plain language of the section 15 agreements on the present record encompasses carriers' agreement to use Murphy as their one devanner in Los Angeles, and that agreement is not directly contested by appellant Dreisbach . . ." *Id.* at 724.

of removing [the] railroads from any possible protection from the antitrust laws." 253 F.2d at 887. However, the anticompetitive activities and conspiracy which Pinney alleges in this case involve far more than the established industry-wide practice which the *Dreisbach* court evaluated.¹⁴

As additional support for their position, defendants cite *U.S. v. Rock Royal Co-op.*, 307 U.S. 533 (1939). The issue in the case concerned "the validity of Order No. 27 of the Secretary of Agriculture, issued under the Agricultural Marketing Agreement Act of 1937, regulating the handling of milk in the New York metropolitan area." 307 U.S. at 541. Certain milk dealers refused to comply with the provisions of the order. When the United States sought an order requiring them to comply, the dealers argued that the order was invalid because its adoption was secured by misrepresentations and because certain private organizations had sought to obtain a monopoly by means of the order. The district court concluded that the order was not enforceable because coercive tactics were used to secure the drafting, acceptance and adoption of the order so as to obtain a monopoly.

Under the Agricultural Marketing Act, the Secretary was authorized to issue orders applying to milk to establish and ensure orderly conditions in its marketing. On appeal, the Supreme Court ruled that the initial adoption of the order met

¹⁴ The Ninth Circuit noted that plaintiff *Dreisbach*'s allegations were not "supported by evidence." 658 F.2d at 729, n.9, and at 730, n.11. Moreover, the court stated:

There is no evidence, and no allegation, that the Carriers here are the only carriers requiring a devanning service in Los Angeles, or that *Dreisbach* was impeded in any manner from seeking to render devanning services in Los Angeles to other carriers.

658 F.2d at 729, n.10. The *Dreisbach* court correctly observed that "[e]very agreement of carriers to use one supplier of a service can be said to confer monopoly status and antitrust immunity on that supplier, at least insofar as rendering the service to those carriers is concerned." In this case, plaintiff alleges that the railroads conspired to completely eliminate them as a direct competitor in dock handling of iron ore. Rather than choosing among competing services, as in *Dreisbach*, defendants in this case are alleged to have conspired to eliminate a competing service, thereby foreclosing the choices of their customers.

with the required statutory standards. After then noting that efforts to compel dealer support of the order by the threat of diverting milk sales were "ineffective upon these defendants," the Court stated:

These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction.

307 U.S. at 560.

Although the defendants correctly argue that the Court minimized the importance of the "influences which caused the producers to favor" the order issued by the regulatory agency, the issue in this case is not whether any order of the ICC is constitutional or enforceable. The issue is whether the defendants acted outside the scope of 49 U.S.C. § 5(b)(9)'s limited grant of antitrust immunity by conspiring to exclude plaintiff as a competitor.¹⁵ Therefore, this court does not read *Rock Royal* as a mandate to hold that the activities alleged by plaintiff in this case are beyond the reach of the antitrust laws.

¹⁵ Citing *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), defendants argue that "the Supreme Court has more recently confirmed that conduct which is otherwise immune from the antitrust laws cannot give rise to antitrust liability simply because it was undertaken with predatory intent." However, this court agrees with the following language of Judge Parker in *United States v. Baltimore & O.R.R.*, 538 F. Supp. 200, 207 (D.D.C. 1982):

... These cases [*Noerr* and *Pennington*] provide [defendants] no solace. At issue was the question whether the lobbying of the legislature and the executive (*Noerr*) or the attempt to influence public officials (*Pennington*) would be immunized from the

(footnote continues)

Defendant B&LE, in a supplemental letter, calls to the court's attention *National Association of Recycling Industries v. American Mail Line, Ltd.*, No. CV82-895-LTL (D.C. Cal. 12/3/82) (*NARI*). *NARI* involved an antitrust suit by a trade association for the paper recycling industry and three of its member firms against a number of ocean carriers and their rate conference. Plaintiffs alleged "that the rates charged by defendants for transporting plaintiffs' wastepaper to the Far East [were] so 'exceedingly high and unjustly discriminatory' that plaintiffs [could] not successfully compete against shippers of processed woodpulp and virgin wood chips, raw materials in direct competition with wastepaper." The court dismissed the complaint, holding that defendants ratemaking activities were immunized from the antitrust laws by the Shipping Act "regardless of whether those rates [were] later found to be violative of substantive provisions of the Shipping Act." This court finds *NARI* to be "analytically distinguishable" from *Aircoach*, and not inconsistent with it.¹⁶

Having examined the actual language of the Interstate Commerce Act, the pertinent legislative history, and the relevant case law, the court concludes that it should apply an analysis similar to that employed in *Aircoach* and its progeny.

(footnote continued)

antitrust laws by the First Amendment even when the actions were intended to eliminate competition. *Aircoach*, on the other hand, was concerned not with whether activity otherwise illegal under the Sherman Act is impliedly immunized by a constitutional provision but, rather, with whether such conduct is explicitly immunized by the Reed-Bulwinkle Act. In other words, the *Aircoach* Court was guided not by abstract constitutional principles but, rather, by the legislative history and statutory intent behind section 5a.

¹⁶ Finding the case before it to be "analytically indistinguishable" from *Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F. Supp. 949 (S.D.N.Y. 1968), cert. denied, 407 F.2d 173 (2d Cir.), cert. denied, 395 U.S. 922 (1969), the *NARI* court criticized the portion of the *Sabre* opinion which held that filed but unapproved rates established under the authority of an FMC-approved agreement are shielded from antitrust attack only if they meet the substantive requirements of the Shipping Act.

Significantly, however, the *NARI* court never faced the one issue in *Sabre* which bears directly on this case.

(footnote continues)

Since a conspiracy to eliminate a competitor cannot fall within 49 U.S.C. § 5(b)(9)'s limited grant of express antitrust immunity, plaintiff is entitled to prove its allegations that the defendants conspired to eliminate it as a competitor in order to monopolize the business of providing dock services for the unloading of ex-lake iron ore.

III.

As a separate ground for dismissal, defendants contend that "this case falls squarely within the *Keogh* doctrine, which bars plaintiff's claim for damages." The *Keogh* doctrine was developed in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922). Plaintiff Keogh, a manufacturer of excelsior and flax tow, sued eight railroad companies under the antitrust laws arguing that the uniform rates they set by agreement were arbitrary and unreasonable. As a defense, the railroads contended that the rates at issue had been approved by the Interstate Commerce Commission. The Court held that "Keogh, a private shipper, [could not] recover damages under [the antitrust laws] because he lost the benefit of rates still lower which, but for the conspiracy, he would have enjoyed." *Id.* at 162. The Court explained:

The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the

(footnote continued)

In *Sabre*, an independent shipping line charged that defendant shipping lines and conferences conspired to unreasonably restrain and monopolize the Hong Kong—United States and Japan—United States shipping trade. Plaintiff alleged that in furtherance of the conspiracy, defendants plotted to drive it out of business through a series of predatory rate cuts. The *Sabre* court held that "predatory rate cutting . . . cannot be immunized by the Commission from the antitrust laws under Section 15." *Id.* at 957.

Since plaintiffs in *NARI* never alleged that defendants conspired to eliminate them as competitors (plaintiffs in *NARI* did not compete with the ocean lines), the case has little bearing on the issues confronting this court.

tariff, cannot be varied or enlarged by either contract or tort of the carrier (citations omitted). This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. . . .”

The Court reaffirmed *Keogh* in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945). See p.7, supra. The Court held that “it [was] clear from the *Keogh* case alone that Georgia [could] not recover damages even if the conspiracy alleged were shown to exist.” *Id.* at 453. The Court reiterated that under *Keogh*, “a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade.” *Id.*

This court does not read either *Keogh* and *Georgia* as precluding plaintiff Pinney from recovering damages under the antitrust laws if it is able to prove the allegations in its first amended complaint. Plaintiff alleges that the defendants conspired to monopolize the business of providing dock services for iron ore and other goods moving over docks on the lower Great Lakes. In order to carry out the ends of the conspiracy, it is alleged that the railroads actively plotted to eliminate plaintiff as a competitor. To accomplish their alleged predatory ends, it is asserted that defendants committed various overt acts including refusing to grant shippers a competitive rate for the carriage of iron ore from Pinney Dock.

Unlike the plaintiff in *Keogh*, plaintiff Pinney does not bring its antitrust suit simply to recover an alleged discriminatory overcharge. Plaintiff seeks to recover damages for the loss of business it allegedly suffered as a direct competitor of defendants. Plaintiff alleges that defendants plotted and carried out a conspiracy to eliminate it as a direct competitor. Unlike in *Keogh*, plaintiff Pinney competed with defendant

railroads for the same customers, and plaintiff could serve those customers only if it in turn was served by defendants. Thus, plaintiff asserts that discriminatory rail rates were merely "a symptom or an incident" of a conspiracy to eliminate it as a competitor. See *Terminal Warehouse v. Pennsylvania R. Co.*, 297 U.S. 500, 510 (1936). As *Terminal Warehouse* points out, antitrust damages may be recovered against rail carriers when they result from "an enveloping conspiracy with its own illegal ends . . . the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity." 297 U.S. at 511, 516.

Defendants correctly point out that in *Georgia v. Pennsylvania R. Co.*, *supra*, the state of Georgia sued not only in its *parens patriae* capacity, but in its "capacity as a proprietor to redress wrongs suffered by the State as the owner of railroad . . .", 324 U.S. at 439; the Court nonetheless held that Keogh blocked its claims for monetary damages. However, the Supreme Court in its decision never treated the state as a direct competitor of the defendants. The Court based its holding on the statement in *Keogh* that a recovery by a shipper under the antitrust laws for a rate higher than that which otherwise would have prevailed would operate as a rebate to give the shipper a preference over his trade competitors. In the present case it cannot be said that plaintiff will unfairly benefit in its status as a competitor of the railroads if it is permitted to recover damages resulting from a conspiracy by those very same competitors to drive it out of business and monopolize the industry.

Approaching the issue from another angle, defendants argue that this case lies within *Keogh's* bounds because "Pinney's claimed injury derives solely from alleged unreasonably high or discriminatory rail rates and charges." As support, defendants submit the various ICC approved iron ore rail tariffs in effect during the period of the alleged conspiracy. For example, Freight Tariff 93-K of the Pennsylvania Railroad Company issued on July 29, 1961 sets "commodity" rates for the transportation of iron ore from railroad docks to various

destinations.¹⁷ Defendants argue that the following 93-K tariff section expressly limited iron ore "commodity rates" to iron ore that was transported from railroad owned docks:

**CHARGES FOR UNLOADING ORE FROM
VESSELS . . .**

On Iron Ore arriving by vessel at the ports of Ashtabula Harbor, Ohio, Buffalo, N.Y. and Cleveland, Ohio, and unloaded by means of the machinery and other facilities owned and furnished by the Pennsylvania Railroad Company, the charge against the vessel for taking the Ore from the hold of the vessel to the rail of the vessel will be 28 cents per ton of 2240 pounds.

Service will be performed only where said machinery and facilities are able to unload the vessel.

**DOCK ORE RATES FROM ASHTABULA
HARBOR, OHIO . . .**

The rates published in this tariff, as applying on Dock Ore from The Pennsylvania Railroad Docks at Ashtabula Harbor, Ohio, will also apply on Dock Ore from the Dock of the New York Central Railroad Company (Western District) at Ashtabula Harbor, Ohio, BUT ONLY WHEN SUCH ORE IS DELIVERED TO THE PENNSYLVANIA RAILROAD COMPANY AT ASHTABULA, OHIO.

¹⁷ The Transportation Logistics Dictionary contains the following definition for a "commodity rate:"

COMMODITY RATE A rate on a specific commodity, or article, moving between specific points, sometimes in a specific direction, and sometimes for a specific minimum quantity. The purpose of the commodity rate is generally to provide a lower rate to reflect lower costs resulting from large scale movement or otherwise. The commodity rate can be higher than a class rate, but it usually is not.

Similarly, supplement 3 to Freight Tariff 2152-K of the Chesapeake and Ohio Railway Company read:

Item No.	Subject	Rules and Other Governing Provisions <u>Special Rules and Regulations-Unlimited</u>
125-A	Charge for unloading Ore from Vessel	On ore arriving by vessel at the port of Toledo Dock, Ohio, and unloaded by means of the machinery and other facilities owned and furnished by The Chesapeake and Ohio Railway Company, the charge against the vessel for taking the ore from the hold of the vessel to the rail of the vessel will be twenty-eight (28) cents per ton of 2,240 pounds. Defendant Note.—This service will be performed only where said machinery and facilities are able to unload the vessel.

Defendants contend that these rates, by their express terms, did not apply to shipments of iron ore from Pinney Dock, so that iron ore shipments from Pinney were relegated to the higher "class rate" system in effect.¹⁸ For example, defendant B&LE states that "[f]rom February 1958 until April 1978 Pinney enjoyed class rates on any iron ore shipments tendered."

¹⁸ The Transportation Logistics Dictionary contains the following definitions for "class rate" and "class tariff:"

CLASS RATE It is a rate resulting from a rating provided in a classification. While commodity rates are available only on limited commodities, a class rate can be found on practically any commodity. The rate in the class rate tariff is normally on class 100 commodities. To determine the class rate it is necessary to multiply the first class rate by a percentage figure applicable on its rating. In the uniform freight classification, the percentage of first class is automatically provided in the classification. That is, a class 87 would mean 87% of first class. Class rates were created to simplify the preceding process providing a specific rate on each commodity moved.

CLASS TARIFF A Tariff containing only class rates.

Several exhibits submitted as part of defendants' motion to dismiss based on the statute of limitations show that class freight rates applied off Pinney Dock. For example, G. B. Weir, Pinney's traffic manager, observed in an August 24, 1970 file memorandum:

The freight rate from Pinney Dock to Youngstown Sheet & Tube is roughly \$5.00.

The freight rate from public ports and certain private docks for iron ore pellets (a commodity rate) is \$2.08.

Similarly, in a June 9, 1971 memorandum, R. T. Beeghly, president of the Standard Slag Company, noted:

Shipment of ore can now be made from other Ashtabula docks to the steel mills at a \$2.60 rate, whereas the established rate from Pinney Dock is \$5.25.

Additionally, in June 1975, J. A. Del Priore, Pinney Dock's director of sales, informed J. Hagen, vice president-operations and facilities planning, United States Railway Association:

Our present rate on iron ore is \$15.90 per gross ton to Pittsburgh and \$11.42 per gross ton to the Youngstown area versus \$4.83 per gross ton to Pittsburgh and \$3.62 per gross ton to Youngstown for the other facilities.

Nevertheless, it is disingenuous for B&LE to suggest that Pinney enjoyed ICC prescribed iron ore rates because "class rates" applied to Pinney Dock.¹⁹ As previously illustrated,

¹⁹ B&LE asserts that "this rate system was prescribed by the ICC in *Class Rate Investigation*, 1939, [281] I.C.C. 213 (1951).

Neither the case cited by B&LE nor its earlier companion, *Class Rate Investigation*, 1939, 262 I.C.C. 447 (1945), provides any justification for defendants' assertions. The focus of these cases was an investigation by the ICC (on its own motion) into "the lawfulness of interstate class rates, all-rail,

(footnote continues)

railroad rates for ex-lake iron ore historically have been regarded as separate and distinct from the rates on all other commodities. In *Iron Ore Rate Cases*, 41 I.C.C. 181 (1916), the Commission carefully set maximum rates for ex-lake iron ore from Ashtabula Harbor, Ohio to various destinations. The Commission stated:

The maximum rates herein found reasonable as set forth in the foregoing table include, as heretofore explained, only the rail-line service from the line-haul carriers' tracks at the lake ports, after the ore has been loaded into the cars, to the points at destination where the carriers' tracks connect with the private industry tracks that serve the furnace plants. They do not include the dock service and the service of placing carload shipments of ore at the point of unloading on private industry tracks at destination, for which service separate charges should be established. [Emphasis added.]

Id. at 219. Since the transportation of ex-lake iron ore has historically been treated under a distinct commodity rate scheme, defendants cannot realistically argue that under the ICC's approved rate schedules, ore shipments from Pinney

(footnote continued)

all-water, and rail-and-water, applicable in the United States generally, except in mountain-Pacific territory and between that territory and the remainder of the country." 262 I.C.C. at 454. Nothing in the Commission's wide-ranging findings supports defendants' statement that under ICC rules, they were justified in quoting "class rates" for iron ore shipments off of private docks at the same time that they were assessing approved "commodity iron-ore rates" for shipments off of their own docks. Indeed, if such were the case, private docks such as Pinney could never have hoped to compete with the railroads in the handling of ex-lake iron ore because the existing freight class rates were so much higher than the published commodity iron ore rates. Yet, as previously pointed out, *supra*, at 16, the ICC itself observed:

It is of course in the interest of the carriers that the ore should move over their own docks. . . . but right of the shippers or others to operate docks of their own cannot be denied.

44 I.C.C. at 376.

Dock were automatically covered by published and ICC approved "class rate" tariffs.²⁰

Moreover, defendants' argument that plaintiff's claims are barred by *Keogh* because the injury resulted from discriminatory rail rates misses the heart of plaintiff's claim. It is the alleged conspiracy itself, rather than the implements used to carry the conspiracy out, which makes this more than a "simple ICC rate case." As the Supreme Court observed in *Continental Co. v. Union Carbide*, 370 U.S. 690, 707 (1962):

[I]t is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.

A conspiracy to eliminate a competitor and monopolize an industry falls outside the bounds of day-to-day railroad rate making. For this reason, such a conspiracy is subject to the

²⁰ S.S. McKinley of the B&O noted in a letter of March 4, 1958 to S. I. Thompson:

You have no doubt received copy of proceedings of the joint meeting held at Pittsburgh, Pa. February 26, distributed by Chairman Kern March 3.

As additional information, after much discussion the attorneys agreed that we could not very well defend publication of higher specific line haul rates from the so-called public docks (Pinney at Ashtabula and Cleveland Stevedore at Cleveland) than are presently published from railroad and steel company private docks. You will recall higher rates previously had been suggested as a means of discouraging the handling of ore over public docks.

Therefore, it was decided to docket a proposal with the Coal, Coke & Iron Ore Committee, C.T.R., on behalf of all lines publishing rates from railroads docks, to restrict the application of the line haul rates so they will only apply on ore received over the railroads' own docks (see CTR Submittal 10448, as amended).

Along the same lines in a Penn Central interoffice memorandum of November 21, 1968 to F. R. Weis, R. L. Wilson concluded that under *Iron Ore Rate Cases*, *supra*, Penn Central "would have to publish 'line haul' rates from Ashtabula Harbor, Ohio [for Pinney Dock]."

harsh consequences of the antitrust laws. Therefore, plaintiff is entitled to prove its allegations that defendants used the iron ore rate system to further a conspiracy to eliminate the direct competition of plaintiff in providing dock services for ex-lake iron ore. Should plaintiff prove its allegations, it will not be barred by *Keogh v. Chicago & Northwestern Railway Co.*, *supra*, from recovering damages.

Defendant B&LE separately argues that "certain of plaintiff's claims should be dismissed for lack of standing to assert them or because [the anticompetitive acts alleged] could not as a matter of law have caused direct or cognizable injury to plaintiffs."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides a treble-damages remedy to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." As the Court recently observed in *Blue Shield of Virginia v. McCready*, U.S. , 73 L. Ed. 2d 149, 156 (1982):

... the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victim of antitrust violations [Citations omitted] "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." [Citations omitted.]

Although section 4 of the Clayton Act's language is broad, the Court in *Associated General Contractors v. Carpenters*, ___ U.S. ___, 103 S.Ct. 897, slip op. at 16 (2/22/83), emphasized that questions of antitrust standing "cannot be answered simply be reference to the broad language of § 4. Instead, ... the question require[s] the [court] to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." The Court in *Associated* set forth several factors to be analyzed by district courts in deciding

antitrust standing questions.²¹ In addition to the threshold requirement that "the claim be encompassed by the Clayton Act," these include (1) "the nature of plaintiff's alleged injury;" (2) "the directness or indirectness of the asserted injury;" (3) whether the damage claims are "highly speculative"; and (4) the need to keep "the scope of complex antitrust trials within judicially manageable limits." *Id.* at 24.

Plaintiff's claims meet the Court's threshold requirement of being "encompassed by the Clayton Act."²² The thrust of plaintiff's complaint is that it was injured in its business and property by a conspiracy among the defendants to monopolize the business of providing dock services for iron ore and other goods moving over docks on the lower Great Lakes. Plaintiff contends that the alleged conspiracy was carried out through a series of anticompetitive activities: monopolizing ownership of

²¹ *Under Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981), to establish standing in an antitrust action, the sixth circuit required:

"(1) that the plaintiff allege injury in fact and (2) that the interest which the plaintiff seeks to protect is arguably within the zone of interests protected by the statute in question."

In *Associated*, *supra*, the Court noted the sixth circuit's standing test, as well as the tests of several other circuits. The Court then observed that "these labels may lead to contradictory and inconsistent results." The Court stated "In our view, courts should analyze each situation in light of the factors set forth in the text, *infra*." Slip op. at 16, n.33.

²² In paragraph 1 of its complaint, plaintiff seeks redress for injuries to its business and property caused by defendants' alleged violations of section 3 of the Clayton Act, 15 U.S.C. § 14. In pertinent part, that section reads:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . or fix a price charged therefor, . . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

On its face, 15 U.S.C. § 14 applies only to "commodities." Since Plaintiff's suit deals with dock and railroad "services, the interests plaintiff seeks to protect are not encompassed by 15 U.S.C. § 14. Therefore, plaintiff does not have standing to raise 15 U.S.C. § 14 in this case. See *Capital Temporaries of Hartford, Inc. v. Olsten Corp.*, 383 F. Supp. 902, 904, n.8 (D. Conn. 1974).

docks on the lower Great Lakes used for the handling of iron ore; boycotting private docks; effectively tying the use of railroad-owned docks to the use of railroad lines; fixing and maintaining dock and railroad rates and charges; dividing markets; and raising spurious challenges to the legitimate business activities of competitors. Plaintiff's allegations meet section 4 of the Clayton Act's requirement that a plaintiff allege injury to its "business or property by reason of [something] forbidden in the antitrust laws."

Since plaintiff meets the threshold test, the court takes up the additional factors deemed pertinent to antitrust standing in *Associated*. Focusing first on the nature of plaintiff's alleged injury, the court notes that plaintiff is a direct competitor of defendants. As the Court stated in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972):

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Since Pinney Dock could not effectively compete with defendants unless it had access to railroad lines, a railroad conspiracy to boycott it could effectively stifle its ability to compete in the business of providing dock services for the Great Lakes iron ore trade. Thus, the injury alleged by plaintiff is the type for which the Sherman Act seeks to provide a remedy.

An additional factor under *Associated* "is the directness or indirectness of the asserted injury." *Id.* at 21. In this case, the chain of causation between plaintiff's alleged injury and defendants' alleged antitrust violations is directly linked. According to the complaint, defendants sought to eliminate plaintiff as a competitor by boycotting it and charging it higher rates. Plaintiff was the direct target of defendants' alleged antitrust violations; defendants' alleged antitrust activities had as their ostensible purpose directly injuring plaintiff's ability to compete in the unloading of ex-lake iron ore.

In *Associated*, the Court expressed concern with allowing a party to proceed where its damage claims are "highly speculative." The Court noted its earlier ruling in *Blue Shield of Virginia v. McCready*, U.S. , 73 L. Ed. 2d 149, 158, n.11 (1982) that:

Section 4 plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.

In this case, the nature of the alleged economic injury suffered by plaintiff is the amount of business it lost as a result of defendants' alleged efforts to drive it out of the iron ore business.²³ Although determining a precise dollar figure for the alleged injury could prove to be an arduous task, "difficulty of ascertainment [should not be] confused with a right of recovery." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). Thus, plaintiff's damage claims are sufficiently tangible and non-speculative to meet the Court's concern that antitrust damage allegations not be "highly speculative."

A fourth factor for consideration set forth in *Associated* is the strong interest, identified in . . . prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits. These cases have stressed the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Associated, supra, at 24-25. Since plaintiff was a direct competitor of defendants in providing dock service for ex-lake iron ore, plaintiff's claim that it was injured by a railroad boycott and conspiracy to eliminate it as a competitor does not create the "risk of duplicate recoveries . . . or the danger of complex apportionment of damages. . . ." To the extent that plaintiff can

²³ Defendant B&LE also moves for the dismissal of plaintiff's claims relating to coal and coke. The court reserves ruling on the issue in view of earlier discovery rulings, see transcript of December 4, 1980 hearing in this case.

prove that its ability to compete with defendants was damaged by the alleged conspiracy, its injury will have been sufficiently discrete and individualized to permit it to recover antitrust damages. Thus, plaintiff's complaint satisfies the Court's requirement that "the scope of complex antitrust trials [be kept] within judicially manageable limits."

As seen, plaintiff's complaint satisfies each of the factors deemed pertinent to antitrust standing by the Court in *Associated*. Therefore, plaintiff has standing to seek treble damages pursuant to section 4 of the Clayton Act.

Defendant B&LE takes its standing argument a step further and argues that even if plaintiff has standing to raise claims relating to an alleged boycott of its dock, it does not have standing to seek damages based on its allegations that defendants conspired to restrain "the business of providing water carriage for iron ore . . . moving over docks on the lower Great Lakes, and . . . the business of building ships for such carriage." Defendant B&LE further contends that plaintiff cannot show "congnizable injury in fact as a result of the alleged agreement to assess the same dock handling charges for bulkers and self-unloaders."²⁴

Defendant B&LE errs in seeking to have this court treat the alleged anticompetitive activities as a series of separate and unrelated events. Plaintiff claims that it was injured by a multi-pronged conspiracy partially aimed at eliminating the competition of private docks in the handling of iron ore. As the

²⁴ In a supplemental letter to this court, defendant B&LE reiterates its argument that "plaintiff lacks standing to complain of defendants' iron ore dock handling charges. . . ." Defendant B&LE argues that under *Associated General Contractors v. Carpenters*, *supra*, plaintiff could not have been directly injured by the alleged conspiracy to fix dock handling charges. Defendant B&LE states:

Steel company shippers are the parties which incur—and are directly affected by—iron ore dock handling charges . . . Indeed, the alleged maintenance of handling charges . . . would necessarily aid Pinney as competitor of defendants.

Supreme Court stated in *Continental Co. v. Union Carbide*, 370 U.S. 690, 699 (1962):

In [conspiracy] cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Patten*, 226 U.S. 525, 544. . . .

The alleged conspiracy to maintain dock handling charges in order to discourage the development and use of self-unloaders relates directly to plaintiff's claim that defendants sought to eliminate its competition in the dock handling of ex-lake iron ore. Thus, plaintiff must be afforded the opportunity to prove its theory that defendants sought to buttress their alleged conspiratorial scheme to thwart the development and use of iron ore self-unloaders on the Great Lakes by seeking to eliminate private dock competition.

Defendant B&LE additionally asserts that Pinney Dock lacks standing to pursue its paragraph 12 allegation that defendants conspired to eliminate competition in and monopolize "the business of providing land transportation for iron ore and other goods moving over [docks on the lower Great Lakes]." The court agrees that plaintiff is not a proper party to raise such allegations. The alleged conspiracy to monopolize the land transportation of iron ore presents legal and factual issues wholly distinct from those generated by the alleged conspiracy to monopolize dock services. But as previously stated, plaintiff is entitled to prove that a group boycott of its dock effectively precluded it from competing with defendants. In so doing, plaintiff may offer evidence showing that alternate methods of iron ore transportation from Pinney Dock were either infeasible or unacceptable to Pinney's potential customers. Moreover, plaintiff may also attempt to prove its allegation that defendants conspiratorially harassed it in its attempts to truck iron ore from its dock, subject to the limitations imposed by *Eastern Railroad Presidents Conference v. Noerr Motor*

Freight, Inc., 365 U.S. 1271 (1961). Additional questions relating to the scope of evidence plaintiff may offer in support of its case can be more appropriately handled as pretrial or trial.

V.

Since the court has ruled against defendants' motion to dismiss on each of the grounds raised, the court must address defendants' argument that this "case should be referred to the Interstate Commerce Commission in deference to that agency's primary jurisdiction." Defendants argue that the ICC should be afforded an opportunity to reach determinations as to the scope of the railroads' express immunity under section 5a and the validity of plaintiff's rate claims.

The doctrine of primary jurisdiction, as presented by the Supreme Court in *United States v. Western Pacific R. Co.*, 352 U.S. 59, 64 (1959),

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

The Court described the test to be applied in deciding whether the doctrine should be invoked:

No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

Id. The court then emphasized the purpose and importance of the doctrine:

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are

more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Id. at 65, quoting *Far East Conference v. United States*, 342 U.S. 570, at 574-575 (1952).

Applying the Court's language, the relevant question in this case is whether considerations of uniformity in regulation and technical expertise mandate that the ICC be given an opportunity to pass on the questions before this court. *See also Nader v. Allegheny Airlines*, 426 U.S. 290, 304 (1976).

Taking up first the question of uniformity and consistency in the regulation of the railroad industry, this court repeats its earlier conclusion that defendants are subject to the antitrust laws unless they acted within the narrow protective scope of the section 5a Eastern Railroads Agreement. Since the alleged conspiracy to eliminate plaintiff as a competitor in order to monopolize the business of providing ex-lake iron ore dock services is not and can not be immunized by the ICC approved Eastern Railroad Agreement, any determination by the ICC as to the scope of defendants' antitrust immunity under their section 5a agreement is unnecessary.²⁵

Nor does this court find that the ICC's technical expertise in the area of railroad ratemaking is needed to properly

²⁵ Defendants argue that the court should refer this case to the ICC under *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), and *Far East Conference v. United States*, 342 U.S. 570 (1952). As the Court made plain in *Carnation Co. v. Pacific Conference*, 383 U.S. 213, 220 (1966):

Those cases merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission.

Since the conspiracy alleged in this case will, if proven, not be debatably legal under the Interstate Commerce Act, there is no possibility of conflict between the court and the Commission.

adjudicate plaintiff's antitrust claims. As has been previously stated, plaintiff's claims amount to more than a "rate discrimination case."²⁶ The issue before this court is not whether the defendants' rates for hauling ex-lake iron ore were reasonable. The issue is whether defendants violated sections 1 and/or 2 of the Sherman Act by conspiring to eliminate Pinney Dock as a competitor and by seeking to monopolize the business of providing dock services for the handling of ex-lake iron ore. The antitrust issues must be decided on the merits in a district court. Since the ICC has neither the jurisdiction nor the unique expertise to decide the antitrust issues before this court, reference to the Commission is deemed unnecessary and inexpedient. Therefore, defendants' motion to refer this case to the ICC is overruled.

VI.

Treating the several motions as Rule 56 summary judgment motions, it is concluded that there are genuine issues of material fact as to the issues raised in these motions. On the basis of the grounds raised in these motions, defendants are not entitled to judgment as a matter of law.

IT IS SO ORDERED.

/s/ WILLIAM THOMAS
U.S. DISTRICT SENIOR JUDGE

²⁶ Defendants argue that plaintiff is precluded from seeking relief under the antitrust laws because it could have sought relief for any unfair rates from the ICC. However, "[t]he rights which [plaintiff] claims under the antitrust laws are entirely collateral to those which [plaintiff] might have sought under the [Interstate Commerce Act]." *Carnation Co. v. Pacific Conference*, 383 U.S. 213, 224 (1966). Plaintiff's alleged failure to pursue any potential ICC remedies does not prevent it from seeking antitrust damages based on a conspiracy to eliminate it as a competitor.



APPENDIX E

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

C80-1733

PINNEY DOCK AND TRANSPORT CO.,
Plaintiff

v.

PENN CENTRAL CORPORATION, et al.
*Defendants and
Third-Party
Plaintiffs*

v.

CONSOLIDATED RAIL CORPORATION
*Third-Party
Defendant*

MEMORANDUM AND ORDER

THOMAS, Senior Judge

In separate but related motions filed on April 15, 1982, defendants Baltimore & Ohio Railroad Company (B&O), Chesapeake & Ohio Railroad Company (C&O), CSX Corporation, Chessie Systems, Inc. (sometimes collectively referred to as Chessie), Bessemer and Lake Erie Railroad Company (B&LE), and Norfolk & Western Railway Company (N&W) move for partial summary judgment dismissing plaintiff Pinney Dock & Transport Company's (Pinney) first amended complaint "insofar as it alleges causes of action which occurred

more than four years prior to the filing of the complaint on September 17, 1980.”¹ Defendants assert that plaintiff's claims, insofar as they are based upon pre-September 17, 1976 events or activities, are time-barred by section 4B of the Clayton Act, 15 U.S.C. § 15b. Defendant N&W additionally asserts that it should be dismissed as a defendant because the evidence in the present record conclusively shows that it was never a party to the alleged conspiracy.

I.

Section 4B of the Clayton Act, 15 U.S.C. § 15b, reads in relevant part:

Any action to enforce any cause of actions under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

Plaintiff Pinney asserts in its first amended complaint that defendants have engaged in continuing violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 3 of the Clayton Act, 15 U.S.C. § 14, “from at least the mid-1950’s until the present time.”²

Invoking the statute of limitations exception of fraudulent concealment to toll the statutory period as to pre-September 17, 1976 claims, plaintiff asserts in paragraph 19 of the first amended complaint:

The violations of law of defendants and their coconspirators were fraudulently concealed by various means and actions, including misrepresentations deliberately made to Pinney to cause it to believe that

¹ The court does not address the related motion of defendant Penn Central Corporation at this time. See this court’s memorandum and order of November 9, 1982.

² In its memorandum and order addressing defendants’ motions for summary judgment on jurisdictional grounds, this court today ruled that plaintiff does not have standing to raise 15 U.S.C. § 14 in this case.

defendants and their coconspirators were acting lawfully and that efforts were being made to devise and carry out plans under which Pinney would be allowed to provide dock services for iron ore. The misrepresentations and other actions were also used to falsely induce Pinney not to assert any claims against defendants and their coconspirators. Pinney relied on the aforesaid misrepresentations and actions, not knowing of their false and untrue character. Pinney could not by due diligence have discovered the aforesaid violations of law by defendants and their coconspirators until evidence of the violations became known in 1979 during the course of a lawsuit between two railroads.

Plaintiff's claim that the exception of fraudulent concealment tolls the four-year antitrust statute of limitations calls into play *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 381, 394 (6th Cir. 1975). *Dayco* "recognizes that the statute of limitations applicable to private antitrust actions may be tolled where a plaintiff did not file its action in time because of ignorance resulting from a defendant's fraudulent concealment." Under *Dayco*, three elements must be established by a plaintiff alleging fraudulent concealment:

(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.

Id.

Plaintiff bears the ultimate burden of proving each of *Dayco's* three fraudulent concealment elements by a preponderance of the evidence. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979). Nevertheless, on the present Rule 56 motion for summary judgment, defendants bear the burden of clearly establishing "that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law." See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "[W]here there is a dispute as

to the issue of fraudulent concealment, the question is one for the jury." *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).

The court now separately takes up each of the three requisite elements for fraudulent concealment which plaintiff must ultimately establish under *Dayco*. If the plaintiff is to prevail on defendants' summary judgment motions, the court must determine that on each of the three *Dayco* elements the record discloses a genuine issue of material fact.³

A.

1.

As stated, the first element which must be established by a plaintiff alleging fraudulent concealment in an antitrust action is "wrongful concealment of their actions by the defendants." *Dayco, supra*, at 394. Plaintiff and defendants disagree as to the standard to be applied in determining whether there has been "wrongful concealment" in this case. Plaintiff argues that in antitrust conspiracy cases, "Congress intended that the statute of limitations be tolled until the time of discovery."

Plaintiff's "discovery" theory is based largely on the following colloquy which appears in the congressional record:

Mr. Patman: Does that 4 years apply to conspiracy cases? Suppose there is a conspiracy, and it is 10 years before the conspiracy is known.

³ In *Ott v. Midland-Ross Corp.*, 600 F.2d 24, 28, n.3 (6th Cir. 1979), the court observed:

The question of whether, under summary judgment procedures, a material dispute of fact exists is not dependent solely upon whether the evidence itself is undisputed, but rather whether the evidence and all reasonable inferences therefrom are likewise disputed. If they are and no reasonable person could construe the evidence and its inferences in other than a single fashion, it is appropriate to render judgment if the application of the law to those facts leads to but a single result.

Mr. Celler: In the case of conspiracy or fraud, the statute only runs from the time of discovery.

Mr. Patman: From the time of the discovery?

Mr. Celler: In conspiracy cases and cases of fraud.

Mr. Patman: And it is not the object or intention to change that at all?

Mr. Celler: That is correct.

Cong. Rec. H.R. 4954, 84th Cong. 1st Sess., 101 Cong. Rec. 5129 (1955). Plaintiff argues that a "discovery" rule in antitrust conspiracy cases "is the logical product of the fact that antitrust conspiracies are almost always concealed."

Representative Celler's statement must be read in light of Congress having chosen four years as a "fair and equitable period of time to govern private treble damage actions brought under the antitrust laws." H.R. Rep. No. 422, 84th Cong. 1st Sess. p. 7 (1955). In choosing four years, Congress sought

to prevent interminable delay and congestion of court calendars, as well as encouraging the prompt adjudication of private treble damage suits. *Id.* at 2.

Representative Celler's statement, reasonably read, is a general statement that the existing fraudulent concealment exception to statutes of limitations, which makes a statute run from the time of discovery, was not intended to be "changed . . . at all." His statement should not be read as an inclusive statement of the requisite elements of fraudulent concealment. For those elements this court must look to controlling judicial decisions.⁴

⁴ As defendants Chessie and B&LE correctly observe, Congressman Celler made this point clear in a prior exchange that occurred five years before the enactment of § 4B when an earlier attempt to add a uniform limitations period (six years) to the Clayton Act was up for consideration. 96 Cong. Rec. H10598-604 (daily ed. July 17, 1950). In response to a complaint by Congressman Hale that the bill being discussed had "no provision . . . that the statutory period of limitation shall not commence to run until a conspiracy brought about by fraud or concealment shall become known to the plaintiff," *id.* at H10602 (emphasis added), Congressman Celler stated:

I am informed that frequently the statutory period does not begin to run until the plaintiff has discovered the facts of his cause of

(footnote continues)

The enduring authority is *Bailey v. Glover*, 88 U.S. 342 (1874). Construing a bankruptcy act statute of limitations, the Court held:

When there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

While the Court did not expressly condition the tolling of a statute of limitations on the suitor's exercise of due diligence in discovering the basis for a suit, the Court said the same thing in different words. It preceded its tolling language with the statement:

When there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit. . . .

In light of this language, the court rejects the plaintiff's "discovery" theory. To accept this theory would effectively negate the third element of *Dayco* that a plaintiff must exercise due diligence in discovering an antitrust cause of action.

Defendants contend that in order to make out the first element of fraudulent concealment, Pinney must show affirmative acts of concealment by the defendants. Defendants cite *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir. 1978). In the second of two antitrust suits (*Rutledge II*) filed by plaintiff Rutledge, the complaint alleged "that defendant Woven Hose was guilty of price discrimination in granting a secret additional discount to favored customers and not to plaintiff." The district court held that the action was time-barred by Clayton 4B's four-year statute of limitations.

(footnote continued)

action which have been fraudulently concealed by the defendant. This bill is not intended to change those rules of the various States. . . . [T]he State rules benefitting a plaintiff in a case where the defendant has been guilty of fraud or of some other proscribed conduct will remain in effect. *Id.* (Emphasis added.)

On appeal, the dispositive ruling was that plaintiff Rutledge had not exercised due diligence in uncovering his cause of action because he had not confirmed his suspicions about defendant's alleged discriminatory pricing through diligent discovery in *Rutledge I*. Under the facts of the case, plaintiff's purported reliance on defendant's simple denials of wrongdoing was not reasonable. Thus, the *Rutledge* holding really relates to the "due diligence" third element of *Dayco*, a case cited in *Rutledge*.

Defendants rely on the following language of *Rutledge* in contending that "Pinney must show affirmative acts of concealment by the defendants" as a condition of the first element of *Dayco*:

To avoid the bar of limitation by invoking the concept of fraudulent concealment, the plaintiff must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief. Silence or passive conduct of the defendant is not deemed fraudulent unless the relationship of the parties imposes a duty upon the defendant to make disclosure.

Id. at 250. On its face the *Dayco* first element of "wrongful concealment of their actions by the defendants" does not expressly require, as *Rutledge* requires, proof of "affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." 576 F.2d at 250. Nonetheless, does the *Dayco* first element require such a condition as defendants contend?

The key word "wrongful" is not defined in the *Dayco* first element. However, it is significant that the *Dayco* court substantially adopted from *Weinberger v. Retail Credit Company*, 498 F.2d 552, 555 (4th Cir. 1974), with one material

change, the three elements necessary to prove "fraudulent concealment."⁵ In the first element, *Dayco* substituted the adjective "wrongful" for the adjective "fraudulent." "Wrongful" is a word of several meanings: "injurious," "unjust," or "unlawful." The narrower word "fraudulent" means "using fraud" or to be "tricky" or "deceitful." *Webster's International Dictionary* (2nd ed. 1939). Applying these definitions, the *Dayco* first element of "wrongful concealment" is understood to cover at least two situations: "actions by the defendants" which deliberately conceal (1) a previously committed fraud (as in *Bailey v. Glover, supra*), or (2) an ongoing unlawful conspiracy, e.g., a conspiracy to violate the antitrust laws.

Thus, under *Dayco's* first element, the type of actions of defendants which might wrongfully conceal a conspiracy to violate the antitrust laws can embrace, but are not limited to, fraudulent misrepresentations as articulated in the *Rutledge* reference, *supra*. The actions of defendants can also be those which cause a conspiracy to be carried out in "a manner which precludes detection," e.g., "self-concealing misconduct."⁶ See *Gaetzi v. Carling Brewing Company*, 205 F. Supp. 615, 620-21 (E.D. Mich. 1962). Cf. *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), cert. denied, 454 U.S. 1164 (1982). Hence, the court finds impermissible

⁵ *Weinberger, supra*, at 555, a federal antitrust action, lists three elements which are "necessary" to toll section 4B of the Clayton Act under "the federal doctrine of fraudulent concealment:"

(1) Fraudulent concealment by the party raising the statute together with (2) the other party's failure to discover the facts which are the basis of his cause of action despite (3) the exercise of due diligence on his part.

⁶ It does not make sense to rigidly apply a statute of limitations where the defendant has carried out its illegal activities in "a manner which precluded detection." As the Supreme Court stated in *Bailey v. Glover*, 88 U.S. 342 (1847):

[Statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or ex-

(footnote continues)

the implication of the defendants that "[i]n order to make out the first element of fraudulent concealment Pinney must show affirmative acts of concealment by the defendants" which constitute fraudulent misrepresentations.

2.

Plaintiff submits a number of exhibits in support of its claim ⁷ that the alleged conspiracy was formulated and carried out under a cloak of secrecy. Plaintiff first points to a series of alleged meetings and discussions occurring between 1956 and 1958. A memorandum of an "informal conference . . . to discuss practices and charges for unloading iron ore from self unloader boats at Lake Erie ports" held on June 7, 1956, written by H.L. Lippold, Pennsylvania Railroad's manager of coal traffic sales and rates, sets forth a detailed interrailroad discussion of what to do about self-unloaders on the lakes. The memorandum records:

It was unanimously agreed it would be desirable and proper that [an] aggregate charge of 40 cents be applied uniformly by all railroads regardless of the actual service performed or its costs, and that consideration be given to tariff changes which may be necessary.

(footnote continued)

tinguished, if they ever did exist. To hold that by concealing a fraud, *or by committing a fraud in a manner that it concealed itself* until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. [Emphasis added.]

Id. at 349. Of course, the third prong of the *Dayco* test demands that a plaintiff exercise due diligence in uncovering an antitrust cause of action, the silence or denials of defendants notwithstanding.

⁷ In connection with the several motions, the court has reviewed the entire mass of exhibits which have been appendicized by the parties. While this memorandum is based on all relevant exhibits, to keep the consideration of the evidence manageable, the court comments on some but not all of these exhibits.

This "agreed" charge was tied into a study to devise tariff regulations "to prevent" undercutting of the 40 cents charge:

Privately-owned or leased facilities constitute another group. The possibility exists that such may attempt to assess charges less than the aggregate of 40 cents gross ton applicable at railroad-operated machines, and it was concluded study should be made to devise tariff regulations to prevent such occurrence. This might be accomplished by restricting in some manner the line-haul rates of the railroads. In addition, it was suggested that leases of railroad docks or facilities should be examined or modified so they will not come in conflict with this objective.

Mr. Lippold's memorandum concluded:

The above is not a proposal and *the understanding was* that until conclusions are reached, including the policy of each individual railroad, *the foregoing will not be publicized.* [Emphasis added.]

Similarly, in a letter of June 20, 1956 regarding the same meeting, S. S. McKinley (B&O) stated:

You will note our representative made a suggestion for consideration of an addition to the present item in the tariffs. . . . No radical departure was advocated from present wording so as not to give the ore people an excuse for requesting an I.C.C. general investigation of the charges. . . . *Is stressed we did not care to see this docketed with, or public-noticed by,* the C.T.R. Committee, as we are considering this as merely a clarification of existing practice. We do not want any opportunity offered for questioning the comparable cost bases for these charges. . . . [Emphasis added.]

In a letter of October 22, 1956, S. S. McKinley stated that a "second meeting of lines was held in Pittsburgh October 11" concerning "handling charges on ex-lake iron ore when re-

ceived from self-unloaders." Referring to a possible tariff change, McKinley stated:

There was considerable discussion as to whether it would be best to add a specific provision in the tariff to cover, as we originally suggested; merely amend the present wording to eliminate reference to use of railroad machinery, etc., as suggested by the PRR, *or make no change whatever so as to avoid directing attention to the questionable present application and possibly also lay ourselves open to litigation on present charges.* [Emphasis added.]

Plaintiff submits evidence of additional meetings relating to the alleged conspiracy which were held in 1957 and 1958, and correctly observes that none of the meetings received public notice. Plaintiff alleges that these meetings culminated in a proposal

[docketed] with the [CCIOC], C.T.R., on behalf of all lines publishing rates from railroad docks, to restrict the application of the line haul rates so they will only apply on ore received over the railroads' own docks. . . .

Mr. Roy S. Kern, chairman of the Coal, Coke and Iron Ore Committee, sent a letter to a number of railroad executives on March 3, 1958 reviewing various agreements as to tariff amendments reached at a meeting on February 26, 1958. In part, Kern observed:

After full discussion of intricate problems which have developed since the practice of transporting iron ore from upper lake ports in self-unloading vessels was commenced, it was *concluded*

(b) that in order to eliminate uncertainties as to the intent of the present ex-lake iron ore tariffs it was agreed that the provisions thereof, defining the application of line-haul rates from railroad docks, should be amended *so as to restrict the line-haul rates to*

apply only on ore handled over the facilities of the publishing or such other railroads specifically named in the present tariff provisions. It was understood that the Chairman would docket this matter with the CC&IO Committee-CTR for account of all interested carriers and publicize the proposal in the manner required by the Eastern Railroads Section 5a Agreement. [Emphasis added.]

The formal proposal of submittal 10448 left the following tariff language intact:

The rates named apply from tracks of _____ Railroad at _____ (Lake Erie Port), after the ore has been loaded into car**** etc.,

but added at the end:

on ore docks of this company (if dock is owned or operated by a railroad other than the publishing carrier, that railroad's name should be specified here)***, etc.⁸

While the New York Central amended tariff is not in evidence, it is presumed from the amended tariffs of the other railroads in evidence that the published wording of proposal 10448 was added as well to the New York Central amended tariff.

Defendants argue that the publication of these tariff changes, together with the notification that they had been "recommended" by the CCIOC in the Traffic Bulletin of April 5, 1958, shows that

rather than concealing their action to restrict the availability of a commodity rate to railroad docks, the railroads' action was publicly available to Pinney, to shippers and to anyone else who was interested.

⁸ The CCIOC on March 18, 1958 took the following reported action:

Action—*Amended* to substitute the words "ore docks" for the word "tracks" in the proposed revised tariff provision and, as amended, *recommended*, subject to concurrence of CC&IO Committee-TLTR and to release from the public docket, release date March 22.

Yet, as seen, nowhere does the tariff amendment incorporate the defendants' agreement of February 26, 1958 that the railroads' line-haul rates would be "restrict[ed] . . . to apply *only* on ore handled over [their] facilities." (Emphasis added.)⁹

Indication that the purpose of the tariff continued to remain vague is evidenced by a handwritten note to F. R. Weis of Penn Central which explained the purpose of the amendment:

The purpose of this change was to prevent unloading from self-unloaders at other than railroad docks and offer of the traffic at some other track.

Furthermore, the tariff amendment does not as a matter of law reveal an additional agreement which S. S. McKinley of the B&O stated was reached at the February 26, 1958 meeting:

Pending developments as to any future self-unloader movements, a unanimous agreement was reached that should any self-unloader ore be offered, all lines operating ore docks would uniformly inter-

⁹ In a letter of March 4, 1958, S. S. McKinley of the B&O stated to S. I. Thompson:

You have no doubt received copy of proceedings of the joint meeting held at Pittsburgh, Pa. February 26, distributed by Chairman Kern March 3.

As additional information, after much discussion the attorneys agreed that we could not very well defend publication of higher specific line haul rates from the so-called public docks (Pinney at Ashtabula and Cleveland Stevedore at Cleveland) than are presently published from railroad and steel company private docks. You will recall higher rates previously had been suggested as a means of discouraging the handling of ore over public docks.

Therefore, it was decided to docket a proposal with the Coal, Coke & Iron Ore Committee, C.T.R., on behalf of all lines publishing rates from railroad docks, to restrict the application of the line haul rates so they will only apply on ore received over the railroads' own docks (see CTR Submittal 10448, as amended).

pret their tariffs, and assess all the present handling charges published in their tariffs.¹⁰

Publication of the tariff changes constitutes evidence which defendants may offer to rebut plaintiff's allegations of concealment. Yet, it cannot be ruled as a matter of law that such publication overcomes the evidence of secret acts by the defendant railroads' representatives to conceal their non-public meetings and unpublicized anticompetitive agreements.

Plaintiff argues that defendants' allegedly secret meetings and dealings continued into the late 1960's and 1970's. Plaintiff submits evidence of a series of meetings in 1968 and 1969 and argues that they were deliberately kept concealed. A July 17, 1968 letter from J. K. Thorney, B&O director of coal commercial planning, to the general coal traffic managers-rates of Penn Central and N&W, states:

Following our day long meeting held in New York on July 9th, the matter of handling charges on ex-lake iron ore received from self-unloader vessels was very briefly discussed. . . .

. . . We understand that a special committee has been appointed to discuss this subject. . . .

. . . This matter has become of grave importance.

. . .

. . . I would appreciate your views as to calling a special meeting on this subject. . . .

(Emphasis added.) Thorney further noted:

Our records also indicate that there was a *verbal agreement* made by all lines to assess the same charges as bulk freights. [Emphasis added.]

¹⁰ This agreement was recapitulated in an interoffice memo from J. K. Thorney (B&O) to G. A. Sandmann written on July 26, 1968:

. . . during 1958, a verbal unanimous agreement was reached between all of the rail lines serving these docks that should any self-unloaders be offered, all lines operating ore docks would uniformly interpret their tariffs and assess all of the present handling charges published in such tariffs.

On August 25, 1969, Thorney wrote to C. S. Baxter, chairman, Coal, Coke & Iron Ore Committee—Eastern Railroads, and stated:

I have just received information that some of the members of the Coal, Coke & Iron Ore Committee, are now in the process of reissuing their ex-lake iron ore tariffs, and there are indications that deviations may be made from the previous tariffs insofar as the manner of publication of such reissues. Under the circumstances, believe this matter should be discussed by all members *at the conclusion of the next meeting*, which is to be held on September 11.

*This subject, of course, should not be listed on the regular docket, but handled informally after the regular meeting.*¹¹ [Emphasis added.]

An interoffice memo of September 22, 1969 from E. J. Siemon, Jr. (N&W) to W. D. Roe, assistant vice-president of rates for N&W, reveals that "handling charges on iron ore discharged

¹¹ Mr. Thorney stated that the subject of "deviations . . . from the previous tariffs insofar as the manner of publication of such reissues" should "not be listed on the regular docket but handled informally after the regular meeting." In his deposition testimony, N&W's Roe, a member of CCIOC, was not directly asked to explain this statement, but rather he was asked about the handling of such matters informally after the regular CCIOC meetings. He said such a matter

. . . could involve some subject that didn't require the filing of a proposal and public docketing, or it could involve a subject that [we] wanted to have a preliminary discussion on prior to filing some formal proposal for a change in rates or charges.

When asked to identify "specific matters . . . handled informally after regular meetings beside the matter referred to in Exhibit 10 [the Thorney letter to Baxter of August 25, 1969], Mr. Roe answered:

I can't recall any specific matters. I indicated in my previous answer some possibilities.

The several Thorney documents provide evidence that the after CCIOC informal meetings may have been affirmative acts of concealment of an ongoing conspiracy. Roe's testimony raises a genuine issue of fact as to the legitimacy of the informal meetings, but it does not overcome the Thorney statements as a matter of law.

by self-unloading vessels" were "discussed after conclusion of the CC&IO-ER meeting in New York, September 11." (Emphasis added.)

Similarly, an interoffice memorandum of W. D. Roe issued on March 3, 1970 reports with respect to "handling charges on ex-lake iron ore from self-unloader vessels:"

The Chairman of the CC&IO Committee is being asked by Penn Central to have the port Lines' representatives discuss this matter *after the March 12 committee meeting*, and in the meantime Bodell has been told that should the N&W receive an inquiry from Youngstown Sheet and Tube, we will not tell them that we will perform the service this year without cost, but that the carriers plan to propose some uniform charge for the service in the near future. [Emphasis added.]

On March 26, 1970, J. K. Thorney sent a memo to G. A. Sandmann marked "Personal" detailing a discussion on March 24, 1970 about ex-lake iron ore handling charges. Thorney observed:

There was no Committee record other than the subject had been reviewed.

Mr. Thorney had copies sent to four other B&O officials with the admonition:

The above for your personal information only, and not to be disclosed to anyone in any manner at this time.

Other accounts of the March 12 and March 24 meetings, including one written by C. S. Baxter, chairman of the Traffic Executive Association—Eastern Railroads, were marked "Personal."

Defendants offer little evidence controverting plaintiff's assertion that their meetings and dealings were kept secret. Rather, they argue that they were not obligated to disclose their private business communications and proposals. Disagreeing, plaintiff argues that "under the terms of the railroads' 5A

Agreement, they had a duty to issue public notices of meetings, proposals, and rate decisions."

The present issue is not whether defendants had a statutory duty to disclose to plaintiff the details of their informal discussions. For purposes of the present motion, the court need only decide whether a genuine issue of fact exists as to the alleged agreement and communications being carried out in a manner which eluded discovery by plaintiff. The memoranda and letters discussed above permit an inference that the defendants took steps to insure that their actions would not become public. These affirmative acts may be found by the trier of fact to constitute both wrongful concealment of the alleged conspiracy in violation of the antitrust laws and acts in furtherance of the conspiracy.

Plaintiff asserts that "the conspiracy was further concealed through defendants' affirmative misrepresentations to Pinney." As articulated in *Rutledge v. Boston Woven Hose & Rubber Co.*, *supra*, one means of wrongful concealment of an ongoing antitrust conspiracy is a co-conspirator's fraudulent misrepresentations. Plaintiff Pinney alleges that affirmative misrepresentations were made at meetings and in communications between Penn Central and Pinney. Plaintiff alleges that Penn Central led it to believe that it was acting unilaterally in denying Pinney a rate and that it was working to get a commodity iron ore rate established off Pinney Dock. A series of letters written in 1968 and 1969 by Penn Central in response to Pinney's request for a line-haul commodity rate is submitted. Defendants refer to additional letters. The principal letters will be considered chronologically.

Defendants refer to the communication of Penn Central's Wilkins to George Weir, traffic manager of Standard Slag (50 percent owner of Pinney), in response to a request for a commodity rate off Pinney Dock. Wilkins wrote Weir on September 4, 1968:

I am informed by our rate people that the subject of publishing rates on pellets originating at private docks on Lake Erie has been considered at a

ing the application of ex-lake iron ore rates from additional docks. Traditionally, rates have been confined to apply from a relatively few docks from which ore moves in large and steady volume. . . . This has been advantageous to the shipping public and to the railroads. It seems clear that to depart from this scheme . . . would be damaging both to the railroads and to the iron ore shippers.

On March 28, 1969, Mr. Weir made a further request that Penn Central extend its ex-lake iron ore rates to Pinney Dock. Mr. Funkhouser responded:

As we have pointed out to you and to the Interstate Commerce Commission, traditionally rates have been confined to apply from a relatively few docks from which ore moves in large and steady volume. The railroads' iron ore transportation service has been arranged with reference to movements of this character. This has been advantageous to the shipping public and to the railroads. It seems clear that to depart from this scheme of transportation by making the ex-lake iron ore rates applicable on spasmodic shipments from what would unquestionably grow to be a sizeable number of small docks would be at variance with the concept underlying said rates and would be damaging both to the railroads and to the iron ore shippers.

These are the basic reasons for our desire not to publish ex-lake rates from the Pinney Dock and from other similar docks, and we do not believe that there is any unjust discrimination in this position. . . .

Plaintiff asserts that it was led to believe by these letters and others "that the reason why Penn Central was unwilling to publish a rate was its unilateral concern about Pinney's ability to meet volume requirements." Pinney submits an internal Penn Central memorandum of August 19, 1974 showing that Penn Central continued informing Pinney into 1974

that the level of ex-lake ore rates was constructed on a volume basis and the extensions of these rate[s] to facilities which could load only relatively small amounts of ore would make the rates unrealistic.

Defendants argue that rather than misrepresent its actions [Penn Central] disclosed both to Pinney and the ICC that its refusal of a commodity rate to Pinney was related to a recommendation by the CCIOC not to do so. . . . Moreover, PC explained to Pinney that the decision to preclude private docks from the commodity rate was considered advantageous to the railroads, and necessary in view of the fact that the railroads could not control the handling charges on self-unloaders at such docks.

And that

[s]uch disclosures by the railroads are inconsistent with any suggestion that [they] were attempting to conceal their activities.

The inferences drawn by defendants can properly be argued to the trier of fact.¹³ However, the evidence, read in a light most favorable to Pinney, does not as a matter of law show that defendants were open and honest with Pinney as to the reasons Pinney was denied a commodity rate. A genuine issue of fact exists as to whether Penn Central misrepresented the reasons for its actions so as to conceal the alleged conspiracy.

Pinney further argues:

In addition to continually misrepresenting its reasons for refusing to publish a rate from Pinney,

¹³ Defendants point out that Mr. Weir "had been an employee of the Pennsylvania RR for approximately eighteen years, at least part of this time in the Tariff Bureau," and that by reason of his experience and education he was "aware of rate bureau procedures generally, and of the CCIOC in particular." With this background, defendants' counsel wonder at his failure to suspect the presence of the alleged conspiracy. This assessment of credibility is for the trier of fact.

Penn Central periodically misled Pinney into believing that it was ready, willing and able to do business with it. The effect of such misrepresentations was to leave Pinney with the clear impression that Penn Central could, and might, change its mind on rates from Pinney at any moment.

Pinney points to communications it had with George Wallace of Penn Central in 1970 about granting Pinney a rate. Several Wallace letters to Pinney indicate that Penn Central was "glad to discuss . . . the question of a modern rail loading facility to be built by [Pinney]," a facility which Penn Central might use in return for issuing an ex-lake iron ore rate from Pinney Dock. Yet, other exhibits show that during this same period, Mr. Wallace was actively participating in meetings and discussions with other railroads on how to limit the use of self-unloaders. In response to a C&O/B&O proposal to lease land to Litton Industries for handling self-unloaders:

[Mr. Wallace] indicated that PC had resisted similar pressures to establish comparable arrangements at the ore docks at Erie as well as at Pinney Docks at Ashtabula.

Pinney asserts that Penn Central's efforts to misrepresent its motives continued into 1973-1975. Maynard Walker, president of Pinney Dock, testified in his deposition:

Jim Royston at one time said to me, "don't worry," he said to me and Joe Del Priore, "Don't worry, boys, Uncle Jim will take care of you."

Similarly, an internal memorandum of October 1, 1975 prepared by Mr. Royston indicates that in a September 30 meeting with Walker and Del Priore of Pinney:

Pinney was reassured that our modification plans for Ashtabula included serious consideration of including Pinney Dock in, or as an adjunct to the consolidated A&B and Union Docks.

Pinney presents evidence to show that Mr. Royston may have been intentionally misleading Pinney. Robert J. Costello, a

former Penn Central employee, testified in a special court proceeding:

I was told to meet with Mr. Royston up at Pinney Dock to discuss it. Pinney Dock had offered to pay the entire cost of this conveyor system that would traverse from Pinney Dock over the Union fence tracks. After the meeting we went back. I discussed it with Mr. Ward, and I discussed it with Mr. Royston. Mr. Royston said that it was a lesson in futility, that we were just trying to appease Pinney Dock and keep them quiet. He said Pinney Dock would never get into the Ashtabula switching district, and it would be over his dead body before it got there. Those were the exact words used.

These letters and statements of Penn Central in the 1970's would permit the trier of fact to find that Penn Central affirmatively misled Pinney into believing that it was willing to "take care" of Pinney Dock's iron ore requests.¹⁴

¹⁴ Plaintiff additionally points to a meeting in August 1974 between M. Walker, G. Weir, J. Del Priore, and B. Cheney of Pinney and P. Funkhouser, Royston, and Wolfinger of Penn Central. Plaintiff contends that it was misled by Funkhouser saying that

Penn Central "was agreeable to putting the wheels in motion to working with Pinney Dock," and that he had "assigned the detailed work to Mr. Royston," who was instructed to "put this assignment on the top of his priority list and to work with us to get the job done."

Defendant N&W responds by stating that Pinney's contention "flies in the face of the testimony of Maynard Walker and Joseph Del Priore during the Special Court litigation between Conrail and P&LE over the trackage rights to Ashtabula." The following testimony of Walker, given in 1979, is set forth:

A. August 23rd met with Royston, Funkhouser, Joe, Ben and myself.

Q. Do you recall anything about that meeting?

A. I was very pleased with that meeting. I thought we were going to get the rate from it. I guess the primary reason I was pleased was that Funkhouser I thought gave Wolfinger and

(footnote continues)

Defendant N&W argues:

At the core of Pinney's fraudulent concealment argument is the contention that Pinney was the victim of fraudulent misrepresentations by defendants which induced Pinney not to pursue possible remedies for perceived unlawful conduct causing harm to its business.

(footnote continued)

Royston a very good chewing out that they had not given us the rate prior to that time.

Q. And you say you thought he gave them a very good chewing out? Do you recall when that chewing out occurred?

A. I believe we were at the Racquet Club or Tennis Club in Philadelphia for lunch. I thought it was a chewing out because Jim Royston's face turned so beet red. Later on when we went back to the Penn Central offices, Funkhouser and Wolfinger had left ahead of us, got into a different elevator and got ahead of us. As we walked off the elevator in the hall and we heard Funkhouser tell Wolfinger at that time to play the game but don't give the rate. We began to realize then that we felt we had been set up.

N&W quotes similar testimony of Pinney's Del Priore given in the special court litigation. Thus, N&W argues that the special court testimony "belies Pinney's current contention that it was misled by Penn Central's representations at the August 23 meeting."

At his deposition in the current case, Maynard Walker testified:

Q. Was that testimony true and correct when you gave it on August 4, 1979?

In response, Maynard Walker gave a lengthy but inconclusive answer. Thereafter, he was asked, "And the truth now is that he did not make that statement?" Before answering, witness Walker repeated the question, "Funkhouser did not make that statement to Wolfinger?" Walker then answered:

A. I can't say that he did or did not make that statement. I as such did not hear it. I heard mumbling, which might have been what Joe and Ben thought that they were hearing. At that time I could not be certain that that is what I was hearing.

The difference between Mr. Walker's 1979 and 1981 testimony is striking. But whether the 1979 and 1981 testimony of Mr. Walker can be reconciled is better left to the trier of fact.

This argument may be directed to plaintiff's allegation in paragraph 19 of its amended complaint that "misrepresentations and other actions were also used to falsely induce Pinney not to assert any claims against defendants and their coconspirators." *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979), dealt with the subject of fraudulent inducement as a ground for equitable tolling of a statute of limitations. *Ott* ruled in part:

If the defendant made a misrepresentation of material fact for the purpose of inducing a plaintiff to delay suit or release him from liability, it is estopped to plead the statute of limitations or to interpose the release as a bar to suit, provided the plaintiff has acted in justifiable reliance upon the misrepresentation. It is unnecessary for the misrepresentation to have been made negligently or fraudulently.

Id. at 31. On the basis of the evidence presented by the plaintiff and the arguments made on the instant motions, it is determined that plaintiff is not pressing its claim as the type of claim explicated in *Ott*. Rather, plaintiff is understood to be asserting the theory of fraudulent misrepresentation in conjunction with a concept discussed but not present in *Ott*. *Ott* states:

It should also be remembered that this case does not involve a defendant's concealment impeding the plaintiff's discovery of his claim, nor does it involve a cause of action which by its very nature conceals itself. Compare, e.g., *Gaudin v. KDI Corp.*, 576 F.2d 708, 713 (6th Cir. 1978); *Hochfelder v. Midwest Stock Exchange*, 503 F.2d 364, 375 (7th Cir.), *cert. denied*, 419 U.S. 875, 95 S. Ct. 137, 42 L. Ed. 2d 114 (1974), and cases cited therein.

Id. at 31.

Defendant N&W, joined by defendants Chessie and B&LE, further argues:

[E]ven if [Penn Central] made misstatements . . . which . . . could constitute fraudulent concealment or

inducement, the statute of limitations would not be tolled as to N&W [or Chessie and B&LE].

The three defendants are correct in observing that the record is barren of possible misrepresentations to Pinney by any of N&W's, Chessie's, or B&LE's officers or employees. However, any defendant who is ultimately found to have knowingly participated in the alleged antitrust conspiracy cannot contend that there was no wrongful concealment if the conspiracy was carried out in a manner which precluded detection. Furthermore, if plaintiff can show that misrepresentations were made by one conspirator during the course of and in furtherance of the conspiracy, then any coconspirators must also bear responsibility for those misrepresentations. *In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1151-52 (7th Cir. 1981), *aff'd on other grounds*, *Pillsbury Co. v. Conboy*, ____ U.S. ____, 103 S. Ct. 608 (1983). See also Fed. R. Evid. § 801(d)(2)(e).¹⁵

The court determines that the evidence in the present record, viewed in a light most favorable to plaintiff, presents a genuine issue of fact as to whether in this case there was "wrongful concealment of their actions by defendants." *Dayco, supra*, at 394.

¹⁵ The two cases cited by N&W in support of its argument are distinguishable.

Cato v. International Longshoremen's Ass'n, 364 F. Supp. 489, 493 (S.D. Tex.), *aff'd per curiam*, 485 F.2d 583 (5th Cir. 1973), holds only that the acts of third parties in concealing a cause of action will not prevent the running of the limitations period as to the real defendant.

In the second case cited by N&W, *Greenfield v. Kanwit*, 87 F.R.D. 129 (S.D.N.Y. 1980), the court refused to apply the doctrine of fraudulent concealment as to two defendants because there was no evidence that they were part of the conspiracy and there was no showing that the claimed concealment was in furtherance of the conspiracy. *Id.* at 132. Therefore, neither of the cases cited by N&W is inconsistent with this court's ruling.

B.

Under the second prong of the Dayco test, plaintiff must ultimately prove its "failure . . . to discover the operative facts that are the basis of [its] cause of action within the limitations period." *Dayco, supra*, at 394. Defendants argue that the evidence in the present record shows that there is no genuine issue of fact that before September 17, 1976 "Pinney knew the operative facts that are the basis of its claim." In response, plaintiff argues that it "did not discover facts showing the railroad conspiracy until late 1979 or early 1980."

Seven top officials and attorneys working with plaintiff in the 1960's and/or 1970's testified under oath at their depositions that they were not aware of a railroad conspiracy to boycott Pinney Dock and restrain the use of self-unloaders. These seven, including M. Walker, G. Weir, J. Del Priore, R. T. Beeghly, P. F. Beery, T. D. Wilcox, and J. F. Donelan, were all actively involved in Pinney's attempts to secure a commodity rate for ex-lake iron ore. The testimony of Maynard Walker, president of Pinney Dock & Transport Co., is illustrative:

I had no idea that Penn Central was working with anybody . . . we knew of no conspiracy, sir, at any time.

Thus, to demonstrate that no genuine issue of fact exists as to Pinney's knowledge of the alleged conspiracy, defendants must show that information in Pinney's possession as a matter of law apprised its officials of the alleged conspiracy.

Defendants first argue that "Pinney was on notice that restrictive iron ore tariff language had been adopted in 1958 by all defendants." Having previously examined the tariff language, *supra*, at 15, the court determines that the language itself does not as a matter of law reveal that the defendants were acting in concert. Nonetheless, defendants argue that statements of top Pinney officials prove that plaintiff knew the railroads were applying their tariffs in a restrictive sense. For example, in a letter of June 24, 1969, Maynard Walker compared Pinney Dock's rates to the "rate structure" for

handling iron ore. Similarly, in a letter of June 19, 1972, while discussing Litton's desire to increase its sale of self-unloaders, Maynard Walker noted:

Their large Tug/Barge vessel is scheduled for operation in 1973. Unless they sell this vessel to a Lakes oriented plant, they obviously have a problem as long as the *railroads refuse to give competitive dock and inland freight rates.* [Emphasis added.]

Knowledge that the railroads had parallel iron ore tariffs is not the same as knowledge of the alleged conspiracy to prevent Pinney Dock from receiving iron ore from self-unloaders and transporting iron ore off its dock. There is no statement in either letter which compels an inference that either Walker or any other official knew of the alleged railroad conspiracy.

Defendants next argue that a series of disclosures in 1968 and 1969 by Penn Central "put Pinney on notice that the railroads had acted jointly to exclude private docks, such as Pinney, from the existing commodity rate for iron ore. . . ." In 1968 Youngstown Sheet & Tube requested that Penn Central establish a commodity rate off Pinney Dock. Youngstown Sheet & Tube conveyed Penn Central's refusal to Pinney. YS&T stated that Penn Central felt "it would be unwise to afford the Pinney Dock the same rate application as the adjacent A&B Dock, [since that] would divert traffic from the A&B Dock." When Pinney itself requested the rate, as seen at 23, R. W. Wilkins, director, Coal & Ore Sales-East for Penn Central, replied in his September 4, 1968 letter to G. B. Weir of Pinney that "at a recent meeting of the" CCIOC "there was a recommendation against extending the application of ex-Lake iron ore rates" and that "Penn Central must be governed by this recommendation." Report of the "recommendation" was repeated in a November 25, 1968 letter to G. B. Weir from A. P. Funkhouser, Penn Central vice-president, Coal & Ore Traffic, *see* p. 24, *supra*. Various Penn Central executives reemphasized the same position in 1969.

Defendants argue that Penn Central's disclosures put Pinney on constructive notice "that the defendant railroads were meeting, discussing and making joint recommendations

on ex-lake iron ore rates inimical to Pinney without public notice." Defendants point particularly to the Wilkins and Funkhouser letters in which Weir was told of the "[CCIOC] . . . recommendation against extending the application of ex-Lake iron ore rates." In various portions of his sworn deposition, Weir testified that he did not believe the CCIOC had made a recommendation because he

relied on the Traffic Bulletin in checking the proposals that came before the Coal, Coke, and Iron Ore Committee. And there was never one published, to my knowledge, that appeared in the Traffic Bulletin.

If Mr. Wilkins was referring to the July 24, 1968 meeting of the special committees of the CCIOC, the minutes disclose no such recommendation as was reported to Weir. *See* n.12, *supra*. Thus, Weir's conclusion appears to be correct.

Taking a different tack, the defendants argue:

In fact, Mr. Weir's admitted knowledge that the joint railroad discussion and recommendation about which he had been advised was not the subject of public notice constitutes an admission by Pinney that it knew an essential element of its present claim.

The defendants have a basis for suggesting such an inference and for arguing that Mr. Weir had knowledge that defendants were "meeting, discussing and making joint recommendations on ex-lake iron ore rates inimical to Pinney without public notice." But the trier of fact might accept Mr. Weir's belief that the Wilkins' letter was "a stalling tactic of answering [his] request for reasons why the rate was not issued."

Defendants additionally argue:

Mr. Weir's admitted knowledge that Penn Central had a right of independent action and that Penn Central was telling him that it nevertheless considered itself governed by the CCIOC "recommendation," constitutes another such admission, since

Pinney now claims that, as part of their conspiracy, defendants surrendered their rights to independent action.

As to Penn Central's being "governed by a [CCIOC] recommendation," Weir stated:

This, I thought, was another misrepresentation of the fact. I knew that the Penn Central had the right of independence—of issuing a proposal under the right of independent action.¹⁶

Defendants can argue to the trier of fact that the above statement of Wilkins, although not repeated in Funkhouser's succeeding letters, permits the inference that Weir was thus alerted to the knowledge of joint action "inimical to Pinney without public notice." But the trier of fact may infer to the contrary that Weir was warranted in believing that Penn Central had not surrendered its statutory "right of independence—of issuing a proposal under the right of independent action."

Citing *Philco Corp. v. Radio Corporation of America*, 186 F. Supp. 155 (E.D. Pa. 1960), defendants argue that "Mr. Weir's claimed disbelief of Penn Central's disclosures is irrelevant." In *Philco*, plaintiff's assistant to its president, F. D. Williams, met with General Electric's vice-president, Dr. Baker. Dr. Baker

told Williams that two representatives of G.E. had met with David Sarnoff of R.C.A. and that Sarnoff had said execution of the cross-license between G.E. and Philco would upset the licensing picture; and that G.E. had agreed not to execute the license until after Philco renewed its R.C.A. package set license on June 30, 1946.

¹⁶ Mr. Weir further testified:

Being a traffic man, I could conceive of no other reason [for Penn Central denying a commodity rate] than that they had some reservations as to whether we could handle the minimum tonnage required on this iron ore rate.

Id. at 164. The court held that *Philco's* asserted disbelief of Dr. Baker did not negate *Philco's* being "informed of the very facts which it *then* recognized as constituting a 'tortious interference in *Philco's* contract negotiations and a violation of the antitrust laws,' . . . and which they now allege as the very claim for relief which was concealed from them." *Id.* (Emphasis in original.) In applying the statute of limitations, the court observed:

We emphasize the point that [plaintiff's officials] were not given facts which might create suspicion or indicate the possibility of a claim for relief based upon the antitrust laws. Rather, they were given the essential facts now constituting their claim for relief (minus only the fact of injury to the public and to themselves). *And they recognized them as constituting a cause of action at that time.*

Id. (Emphasis in original.)

Unlike *Philco's* bare-boned disbelief of Dr. Baker's statements, Mr. Weir gave reasons which the trier of fact might accept for Mr. Weir rejecting the report of the CCIOC "recommendation" and Penn Central being allegedly "governed by this recommendation." Moreover, this report of Penn Central did not as a matter of law inform Pinney of the existence of the alleged railroad conspiracy.

Defendants also argue that Pinney's right to bring an antitrust action against the railroads was made clear to Pinney throughout the late 1960's and early 1970's. Penn Central's Wallace, by letter of June 3, 1970, had indicated that Penn Central refused to grant the iron ore commodity rate sought by Mr. Weir. Defendants say "if Pinney had any doubt concerning Penn Central's position following receipt of Mr. Wallace's letter, such doubt was certainly removed when William Grover of YS&T related a conversation that he (Grover) had had with Mr. Wallace." As reported in a Weir memorandum of July 9, 1970 to Walker, Mr. Grover recounted this conversation:

Yesterday, Mr. Wallace called upon William Grover of Youngstown Sheet and Tube here in Youngstown. During the course of their conversation, William

Grover asked what Mr. Wallace intended to do regarding this request [to establish a competitive iron ore rate from Pinney Dock]. Mr. Wallace's response was "*let them sue us*," he was not going to be responsible for spreading these ex-lake iron ore rates over every dock along Lake Erie.

Shortly after hearing this statement, Pinney contacted Paul F. Beery, a Columbus, Ohio transportation attorney. Statements made by Beery to Pinney Dock are purported to have advised Pinney of the alleged antitrust conspiracy. The following portions of a letter from Beery to Maynard Walker written on September 13, 1971 are deemed especially pertinent by defendants:

If Pinney Dock still desires to attempt to break into the unloading of ex-Lake iron ore, you should consider the formal complaint to the [ICC] possibly followed by an antitrust action against Penn Central . . . the complaint to the courts would be in order to recover the damages caused by Penn Central's refusal to publish rates from your dock. . . .

We are considering coupling any administrative action with some widely based investigation of the conditions now prevailing upon the Great Lakes in relation to the unloading of iron ore and the monopolistic conditions there that may significantly affect the public. . . .

While the present action may not break the "club," it may result in your being admitted as a "member". . . .

In response, Pinney argues that Beery himself never knew of a conspiracy among the railroads and that he used the terms "club" and "group" to describe the relationship between Penn Central and the steel companies, rather than a conspiracy among railroads. The following testimony of Beery, given at his sworn deposition in this case, is illustrative:

A. . . . we are trying to get the equal rate of those dock facilities so basically we can move iron ore to Youngstown Sheet and Tube.

Q. All right, and you need to break into the club to do that?

A. That was obviously the parties I am concerned with, Penn Central and Youngstown Sheet and Tube.

Q. And you saw them as the club?

A. That is more than one.

Q. I agree with that, but I just want to know when you use the word "club," what you are referring to.

A. I have answered it yes.

Q. Those two, thank you.

Mr. Beery was later asked about his characterization of Great Lakes ore unloading conditions as monopolistic:

Q. By the way, Mr. Beery, what do you mean when you say monopolistic?

A. Well, basically when you look at the Penn Central conditions at Ashtabula—and let me see if that was what I was talking about—they certainly were.

Q. Are you familiar enough with the federal antitrust laws to understand the term monopoly as used in those statutes?

A. Absolutely not.

Mr. Beery later testified:

A. Well, what I am talking about, railroads and steel mills, I obviously as far as the railroads, would have to be concentrating on Penn Central because that was my only interest as far as Pinney Dock is concerned. My interest never went beyond Penn Central. . . .

Mr. Beery's testimony raises questions as to defendants' assertion that he was revealing to Pinney the existence of a railroad conspiracy. Furthermore, the sworn testimony of Pinney's

executives raises an issue as to how they understood Mr. Beery's comments. Maynard Walker's testimony is illustrative:

Q. Do you remember having discussions with Mr. Beery about monopolistic conditions relating to the unloading of iron ore?

A. I do recall that, and I don't believe that I believed what he was saying there. There is something like eight ports on Lake Erie, there are two or three railroads going into each port, at least some of the ports. There are many combinations of what could haul iron ore down to the mills.

To me I could see no monopolistic condition existing.

Q. So you didn't think Mr. Beery knew what he was talking about?

A. I believe I have testified previously that I came to that conclusion sometime before this.

The court determines that the statements of Paul Beery and Pinney's other attorneys concerning possible legal actions against Penn Central cannot as a matter of law be said to have informed Pinney of the "operative facts" of its present cause of action.¹⁷

C.

The third prong of the *Dayco* fraudulent concealment standard requires that plaintiff prove its "due diligence until discovery of the facts." *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 289, 394 (6th Cir. 1975). "The burden is a

¹⁷ John Donelan, an ICC attorney retained by plaintiff to pursue a possible ICC case against Penn Central, testified in his deposition that he did not know of the alleged conspiracy to exclude Pinney. Similarly, Thomas D. Wilcox, a Washington attorney who negotiated with Penn Central on behalf of Pinney, testified that he was unaware of the alleged conspiracy.

heavy one." *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979). As the court stated in *Dayco*, *supra*:

The Supreme Court case of *Woods v. Carpenter*, *supra*, long ago established the standards for pleading fraudulent concealment. The Court said that an injured party has a positive duty to use diligence in discovering his cause of action within the limitations period. Any fact that should excite his suspicion is the same as actual knowledge of his entire claim. Indeed, "the means of knowledge are the same thing in effect as knowledge itself." 101 U.S. at 143.

523 F.2d at 394. In *Campbell v. Upjohn Co.*, 676 F.2d 1122 (6th Cir. 1982), the Sixth Circuit emphasized that "[t]he plaintiff's ignorance of his cause of action does not by itself satisfy the requirements of due diligence and will not toll the statute of limitations." *Id.* at 1127.

In seeking summary judgment, however, defendants have "the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing [this present] suit." *In re Beef Industry Antitrust Litigation*, *supra*, at 1171. Thus, defendants will prevail only if there is no genuine issue of fact that plaintiff would have discovered its present cause of action prior to September 17, 1976 by exercising due diligence.

Defendants argue that plaintiff knew enough facts "to excite its suspicion concerning the alleged conspiracy." Defendants further assert that "Pinney had at least five opportunities to discover its cause of action by due diligence and failed to act on each occasion."

As "Opportunity No. 1," defendants maintain that the change in the railroads' iron ore tariffs in 1958, coupled with the New York Central's refusal to publish an iron ore commodity rate off Pinney in 1959, "should have put Pinney on notice that the railroads intended to use their tariffs to exclude private docks or at least should have moved Pinney to make inquiry."

However, the exhibits proffered by plaintiff reveal that defendants' assertions oversimplify the nature of the events occurring between 1956 and 1959.

On August 1, 1957, Pinney Dock extended a formal offer to Republic Steel Co. to handle "bulk materials from self-unloading boats including limestone, quartz, taconite pellets, or any other material of a similar nature. . . ." Pinney requested the New York Central to give it the same line-haul rate on iron ore as was in effect from New York Central's Ashtabula dock. The New York Central then presented a formal proposal to the CCIOC to extend from Pinney Dock, Ashtabula Harbor, Ohio, the same rate as was "currently in effect from Lake Erie Docks, both railroad and privately owned, to Youngstown."

Since at least 1956, however, informal railroad conferences had been held to "discuss practices and charges for unloading iron ore from self-unloading boats at Lake Erie ports." In a letter of October 10, 1956, S. S. McKinley observed that the railroads were "unanimous" in their "determination that [they could] not and [would] not charge less than the bulk freighter charges presently assessed. . . ." Thus, in response to the NYC proposal, a meeting was held on September 17, 1957 at which Mr. Lippold of the PRR pointed out to Mr. Maurer of the NYC that

the lake lines had had a number of meetings designed to find a way to protect the investment in railroad facilities against such private docks so that the charges made by railroads for handling ore would not be undercut. . . .

According to a September 18, 1957 letter of J. A. Wilson,

Lippold . . . was very critical of the NYC for not first conferring with other lake lines before filing the proposal. . . .

Mr. Lippold was insistent that the NYC have a meeting with other lake lines to talk this matter out. . . .

Indeed, Mr. Lippold himself observed in a memorandum written on the same day:

With reluctance, the N.Y.C. finally agreed to have its proposal reviewed by the other involved railroads. . . .

Shortly thereafter, on October 9, 1957, Mr. Belitz of NYC sent the following message to the CCIOC:

Please refer to your submittal 10,312 which covered our proposal to establish rate on iron ore (ex-lake) from Ashtabula Harbor, Ohio (Pinney Dock). . . .

It will be appreciated by the undersigned if you will withdraw this proposal from your docket.

Undoubtedly after it withdrew submittal 10,312 on October 9, 1957, New York Central informed Pinney that it would not extend an iron ore commodity rate off Pinney's dock. Yet there is no evidence in the record which directly indicates what New York Central told Pinney. Nonetheless, a finder of fact may assume that in its communication, New York Central did not inform Pinney of the pressure exerted on it by the other railroads to withdraw submittal 10,312.

The evidence in the record is not sufficient to find as a matter of law that Pinney had learned that the amended 1958 New York Central iron ore commodity rate was denied extension to Pinney Dock because of the alleged conspiracy. Otherwise, Pinney would not have written New York Central as it did on March 13, 1959. Ned V. Collander, Pinney's manager of research and development, wrote to the NYC:

. . . I have had inquiries regarding the use of your railroad in moving materials within CEICO. When may we expect to hear from you regarding a switching rate in CEICO?

At some point in time before March 1959, Pinney had learned, as Collander's letter shows, that New York Central had placed it in the CEICO switching district. But the trier of fact might find that Pinney had not learned that

. . . the NYC Law Department [had] informed the NYC Traffic Department that the rate on ex-lake iron

ore already published by the NYC from Ashtabula would apply from the Pinney Dock at that port without the necessity of filing a special rate proposal.¹⁸

Once again important information was deliberately kept from Pinney, the trier of fact might find. With continued shielding of the true situation from Pinney, the defendants may not ask this court to find as a matter of law that Pinney "failed to act" on "Opportunity No. 1" through lack of diligence.

Pinney sought a solution to the CEICO problem through a more formal inquiry. On March 19, 1959, Collander wrote to Congressman Robert Cook explaining that Pinney was operating "under definite disadvantages because of the separate switching area that was established by the New York Central Railroad." Collander then requested:

I would appreciate any information that your office can get for me from the ICC regarding the original establishment and subsequent extension of CEICO.

Congressman Cook sent Pinney's letter on to the ICC. The ICC inquired of the NYC as to the matters raised in Collander's letter. In a letter of May 12, 1959 to the director of the ICC, the NYC outlined the history of the development of the CEICO district. No mention was made of the previous informal meetings and discussions concerning the need to eliminate private dock competition.

Viewed in the light most favorable to Pinney, these facts permit an inference that Pinney was led to believe that it was denied the Ashtabula rate because of its location. It cannot be said as a matter of law that Pinney should have jumped to the conclusion that a railroad conspiracy was in progress. The

¹⁸ In a B&O letter of October 17, 1957 to E. A. Schofield, the above-quoted language was preceded in the sentence by the statement:

You will note that the meeting scheduled for October 15 was not held because the New York Central Law Department, etc. . . .

The next sentence stated:

We feel the ruling of the NYC Law Dept. is a proper one.

record discloses that Pinney made several inquiries as to why it was placed in the CEICO district. Nothing in the responses to Pinney or the ICC revealed the existence of a conspiracy to "eliminate the threat of Pinney Dock."¹⁹

Defendants argue that even if the 1958 tariff changes and the NYC's commodity rate denial did not by themselves cause plaintiff to discover the alleged conspiracy, "[discovery] Opportunities Nos. 2 and 3" presented themselves to plaintiff in 1968 and 1969. Defendants posit that these opportunities arose, as they say in their brief, when Penn Central advised Pinney that "the railroad considered itself 'governed' by a CCIOC recommendation not to extend commodity iron ore rates to private docks . . . and that its ex-lake iron ore tariff specifically excluded application of commodity iron ore rates from private docks such as Pinney. . . ." Defendants state that "[t]hese facts should have led Pinney at least to make inquiry" and that "Pinney should have investigated." Defendants argue that Pinney would have thereby discovered that the tariff language cited by Penn Central appeared in "the tariffs of every railroad with an iron ore dock on Lake Erie and that the tariffs were amended pursuant to joint action of the CCIOC as noticed in the Traffic Bulletin." Defendants postulate:

Had Pinney instigated an ICC inquiry of the 1958 amendment, it could have discovered the CCIOC minutes of the February 26, 1958 meeting because the ICC had the power to examine CCIOC records. . . . These minutes record the railroads' discussions of the problems caused by self-unloaders and the railroads' resolve uniformly to apply bulker handling charges to self-unloaders and to restrict commodity iron ore rates to railroad docks. . . .

¹⁹ Pinney may also have been led on by statements of NYC officials that they were anxious to serve Pinney's needs. For example, in a December 10, 1962 letter to Nelson J. Pinney, the founder and then president of Pinney, the NYC stated:

Please be assured that we on the New York Central are vitally interested in the economic development of good customers such as yourself, and feel free to avail yourself of our services at any time.

To rebut defendants' argument that it failed to exercise due diligence after receiving the Penn Central letters, plaintiff submits a series of letters it wrote to the ICC and others after it received Funkhouser's November 5, 1968 letter. On January 29, 1969, G. Weir, on behalf of plaintiff, filed an "informal complaint" with the ICC against the Penn Central. In his letter Weir briefly stated the facts as he saw them. He also attached the September 4, 1968 letter of Wilkins and the November 25, 1968 letter of Funkhouser. Weir stated, "[t]he Pinney Dock ... seeks affirmative relief from the Interstate Commerce Commission through this informal complaint."

In sending the "informal complaint," Weir was attempting to instigate the type of ICC investigation defendants say Pinney never requested.²⁰ Following the receipt of Weir's letter, the ICC, following the mandate of 49 U.S.C. § 13(1), forwarded the complaint to Penn Central. On February 25, 1969, J. T. Bodell of Penn Central wrote to the ICC stating that Penn Central's position was "lawful in all respects." He referred the ICC to Funkhouser's November 25, 1968 letter. H. Neil

²⁰ 49 U.S.C. § 13(1) states:

Complaints to Commission of violation of law by carrier; reparation; investigation

(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, *may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.* [Emphasis added.]

Garson, Secretary of the ICC, then informed Pinney that the ICC could only change the rates "after [a] full hearing of the parties to the controversy." Garson added:

Under the circumstances, if you desire to proceed further before this agency it will be necessary to do so through the medium of a formal complaint.²¹

Following Garson's response, Pinney took up the subject of filing a formal complaint with Washington attorneys as discussed hereafter. Meanwhile, plaintiff continued its pursuit of an ICC-mediated solution. Plaintiff contacted Congressman William Stanton. Congressman Stanton forwarded plaintiff's complaint to the ICC.

The ICC initiated an investigation of the matter by asking Pinney and Penn Central certain questions about the CEICO district. In letters of June 18, 1969 to both parties, E. V. Grosvenor, chief of the ICC's section of rates and informal cases, asked:

Is it correct to say that Pinney Docks are completely within the corporate limits of Ashtabula?

Is the Penn Central station Ceico within the corporate limits of Ashtabula?

Are switching limits of Ashtabula published in any tariff?

If the answer to the first two questions is "yes" and to the third "no," why isn't the Ashtabula Harbor to Youngstown rate in Item 1104-E, Supp. 41 to Penn Central tariff 1501-G, I.C.C. 2295 (NYC RR Series), applicable in accordance with Item 80, and in harmony with the Commission decision in *American Oil Co. v. B.&O. R. Co.*, 238 I.C.C. 503?

²¹ Whether or not under these circumstances the ICC should have ordered pursuant to 49 U.S.C. § 15(1) "an investigation . . . on its own initiative" and "without any complaint whatever," which investigation might or might not have led to a "full hearing," need not be addressed by the parties or the court at this juncture. Rather, it is essential to consider the steps Pinney took following receipt of the Garson letter.

In a reply of June 30, 1969, J. T. Bodell of Penn Central defended the placing of Pinney Dock into a switching district distinct from Ashtabula. He added that the clause "[t]he rates named apply from the ore docks of the [NYC. . . .]" made the rates "inapplicable from private docks such as Pinney Docks."

Apparently unsatisfied, Mr. Grosvenor responded to Mr. Bodell on July 31, 1969, stating that "it appears Pinney Docks are within the Ashtabula switching limits" and that the tariff clause cited did not preclude application of the Ashtabula rate from Pinney Dock. On August 18, 1969, Bodell wrote back defending "[his] company's interpretation of the involved tariffs."²²

This sequence of letters permits an inference that plaintiff exercised due diligence in seeking an ICC investigation and remedy. Nothing in these letter exhibits shows that the ICC ever suspected that a conspiracy may have been in progress or traced Penn Central's response back to the 1958 tariff amendments. Indeed, the ICC, like Pinney, treated the issue as arising from a unilateral interpretation of certain tariffs by Penn Central.

As discovery "Opportunity No. 5," defendants argue that Pinney should have filed a formal ICC complaint. Faced with the ICC's response to its complaint, plaintiff made arrangements in May 1969 "to review the whole subject with Attorney John Donelan in Washington, D.C." In a letter of October 3, 1969, John Donelan, a highly respected transportation attorney, advised Pinney:

As indicated to Mr. Weir it is our judgment that the successful prosecution of a formal complaint for relief to the Interstate Commerce Commission will require the strongest possible evidence. The basic

²² Only two weeks before Bodell's response, Funkhouser was informed by J. R. Sullivan of Penn Central:

As far as merchandise traffic is concerned, there is no substantial reason that we cannot publish the same rates to or from Ceico as to or from Ashtabula and subject to the same accessorial service provisions. This has already been done on clay.

thrust for relief would be under Section 3(1) of the Interstate Commerce Act prohibiting undue preference and/or undue prejudice.

Of tremendous importance, in our view, is evidence presented by prospective users of the rates and service thereunder. This will go to the question of proving damage, one of the essential elements in making a case under section 3(1). . . .

As indicated to Mr. Weir on the telephone, as of this date with the state of the evidence developed, it is our considered judgment that it would be premature to file a formal complaint for relief with the Interstate Commerce Commission. We need additional evidence. In reaching this judgment we are mindful both of the resourcefulness and the tenacity of the Penn Central. Positions have been taken by the latter at a very high level of management. This is not a normal case. You can anticipate intense and able opposition.

Defendants observe:

While Mr. Donelan did tell Pinney that a shipper witness was of tremendous importance, he reserved final judgment on whether to proceed if Pinney was unable to find one.

Actually, the final two sentences of Mr. Donelan's letter read:

As of now we do not feel the necessary checks for all the desirable, if not required, evidence have been completed. When they have been completed, we suggest that the results be presented to us and we will be glad to render our final judgment as to whether we recommend that the formal complaint be prepared, filed and prosecuted.

It is clear that at no point in the concluding sentences did Mr. Donelan retract his earlier statement that "evidence presented by prospective users of the rates and service thereunder" was "of tremendous importance." Mr. Donelan explained that the

"prospective user" evidence "will go to the question of proving damage, one of the essential elements in making a case under section 3(1)."

In his letter Mr. Donelan recounted his own inability to find a shipper witness:

I have spoken on the telephone with Messrs. Day and Felton of Youngstown Sheet and Tube Company and Wheeling-Pittsburgh Steel Corporation, respectfully. Mr. Day indicates he is not in a position to supply a witness. Essentially the same applies to Mr. Felton. It is our recommendation that this matter of willingness to use the rate and the service be checked with all potential users. It is our hope that this will produce some witnesses.

Mr. G. Weir summarized at his deposition Pinney's unsuccessful efforts to obtain a "shipper witness:"

We made many, many, many attempts. We called on all the steel companies in our area and, to name a few, we called on Youngstown Sheet & Tube, we called on Sharon Steel, we called on Republic Steel, we called on Wheeling Steel Company, we called on Jones & Laughlin Steel Company, we called on National Steel Company.

Since all attempts to procure a shipper-witness were apparently fruitless and since Mr. Donelan had stressed that such evidence of prospective users was needed to prove the essential element of damage "in making a case under section 3(1)," the trier of fact might infer that this explains why Pinney did not go back to attorney Donelan to get his "final judgment as to whether" he recommended "that the formal complaint be prepared, filed and prosecuted."²³ Thus, it cannot be deter-

²³ The official minutes of Pinney Dock's 1972 annual board of directors meeting observe:

President Walker also reported that the application to the ICC for a rate reduction of the railroad rates charged by the Penn Central had been dropped as a result of the inability to present evidence from independent third parties.

mined as a matter of law that the plaintiff failed to exercise due diligence in not proceeding with a formal I.C.C. complaint.

In 1970 plaintiff consulted Paul Beery, a Columbus attorney, to determine whether Pinney might have a cause of action against Penn Central under state law. As discovery "Opportunity No. 4," defendants argue that beginning in 1970, when Beery advised Pinney to pursue an antitrust action against Penn Central, "Pinney, acting as a diligent plaintiff, should have become better informed as to its rights." Defendants state that Pinney is precluded from asserting that it exercised due diligence because it "made a deliberate business decision" not to pursue an antitrust cause of action. Defendants contend:

As Mr. Beery clearly realized, . . . an antitrust action would have provided broad-based discovery of the detailed facts now alleged by Pinney.

As previously observed, *supra*, at 42, a genuine issue of fact exists as to whether Mr. Beery's statements alerted Pinney to the possibility that a railroad conspiracy to eliminate it was the cause for Penn Central's refusal to extend Pinney an iron ore commodity rate. Moreover, Pinney cannot be expected as a matter of law to have filed an antitrust action merely to obtain "broad-based discovery." Rule 11 of the Federal Rules of Civil Procedure demands "good ground[s]" for the filing of any pleading in federal court. Absent actual knowledge or a well-founded suspicion of illegal concerted action, Pinney would not have had "good grounds" for filing an antitrust suit alleging a conspiracy among defendants to eliminate the competition of private ore docks.

The above efforts were not the only ones exerted by plaintiff in its attempt to resolve its dilemma. In 1973 plaintiff contacted John A. Creedy, president of the Water Transport Association, for aid in getting Penn Central to extend it an iron ore commodity rate. Creedy contacted the Justice Department and reported in a September 14, 1973 letter to Weir that the "Justice people liked the Pinney Dock problem." Creedy felt they had "fascinated" them and stated "they are referring the matter to their economic policy staff." Notwithstanding, the record discloses no statements by the Justice Department which indicate that it learned of or informed Pinney of the possibility of concerted railroad action.

Plaintiff also presents evidence showing that in June 1975 it contacted the United States Railroad Association, the agency controlling the reorganization of Penn Central and seven other eastern railroads. Pinney outlined the history of its relations with Penn Central and sought the Association's aid in obtaining an iron ore commodity rate. In a letter of October 14, 1975 to Mr. Edward Jordan, chief executive officer of Conrail, James Hagen, president of the association, observed that his staff had "done considerable research in the past five months on the problem of what to do with the Penn Central facilities at Ashtabula." Hagen recommended that Conrail negotiate with Pinney Dock "to arrange for a gradual transfer of ore unloading operations . . . to Pinney." Nothing in the evidence reveals that the association, in carrying out its "research," uncovered any facts indicative of the alleged railroad conspiracy.

Notwithstanding the failures of the ICC, the Justice Department, and the Water Transport Association to come upon the alleged conspiracy, defendants assert:

Even where the Justice Department has investigated and has assured plaintiffs that no antitrust violation has occurred, the courts have held that the Justice Department's efforts and advice did not relieve private plaintiffs of their own obligations to pursue their claims. *Rutledge v. Boston Woven Hose & Rubber Co.*, [supra]; *Starview Outdoor Theatre v. Paramount Film Distribution Corp.*, 254 F. Supp. at 857 (N.D. Ill. 1966).

Defendants' argument misses the point. The court finds the evidence relating to the activities of the ICC, the Justice Department, and the Water Transport Association to be probative because they raise an issue as to whether the alleged conspiracy was discoverable through the exercise of due diligence during the relevant time period. Moreover, Pinney's having contacted these agencies, as well as a number of attorneys and railroad officials, provides facts upon which the trier of fact could base an inference, as Pinney argues, that it "consulted every conceivable organization and individual in its attempts to address the problem confronting it."

Furthermore, Pinney's attempts to obtain relief must be viewed in the context of the evidence discussed earlier which permits an inference that Penn Central may have kept Pinney's hopes up at the same time as it was acting with other defendants to conceal the alleged conspiracy. As the Supreme Court observed in *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946):

If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.

Citing *Campbell v. Upjohn Co.*, 498 F. Supp. 722 (W.D. Mich. 1980), *affirmed* 676 F.2d 1122 (6th Cir. 1982), defendant N&W argues:

Although Walker's testimony is clear as a bell that he did not rely upon any representation by any defendant in determining whether or not to pursue Pinney's claims against Penn Central as a result of Penn Central's persistent refusal to grant Pinney a commodity line-haul rate on iron ore, the trial court's decision makes it clear that any "assurances" of better treatment in the future, assuming *arguendo* any such "assurances" were given, would not excuse Pinney's failure to pursue remedies available to it.

In *Campbell, supra*, the plaintiff, part owner of Homemakers, a home health care provider, executed a merger agreement between Homemakers and Upjohn in 1969. In 1975, claiming violations of the Securities Acts, Campbell filed suit. He

allege[d] that Upjohn had procured his signature on a merger agreement fraudulently by promising a back end payment, and that Upjohn had fraudulently concealed from him the terms of the merger agreement by making oral assertions after the signing that his payment would be forthcoming.

676 F.2d at 1125. In addressing the issue of fraudulent concealment and the element of "due diligence," the trial judge

(Benjamin F. Gibson, J.) stressed that the "assurances" of Upjohn had to be considered in the context of plaintiff Campbell's never having read the merger agreement which he signed. In granting summary judgment, Judge Gibson ruled:

In light of what Campbell knew, and what he should have realized, Upjohn's occasional assurance that the "back end" payment would be made in 1975 should not have interfered with his discovery of the alleged scheme. The assurances may be nothing more than mere denials of wrongdoing that do not rise to acts of fraudulent concealment; even if so, they could readily have been verified by reference to the Agreement. . . . Whatever Campbell's condition, he was sufficiently recovered by November of 1971 to retain counsel. . . . Surely by then he had sufficiently gathered his wits to finally examine the documents he knew he had signed. The court, can only conclude that the plaintiff had sufficient reason to inquire into the underlying facts, and so discover his cause of action, no later than November of 1971. The statute of limitations on his claim thus expired in November of 1973, almost two years before he initiated this suit.

498 F. Supp. at 731-32.

The Sixth Circuit upheld the district court's ruling that plaintiff did not exercise due diligence because he could have discovered his cause of action simply by reading the merger agreement which he signed and had in his possession. Unlike in *Campbell*, the documents in the record of this case present a genuine issue of material fact as to whether the means for discovering its cause of action were reasonably ascertainable to plaintiff Pinney. Hence, the court may not and does not determine as a matter of law that Pinney has failed to exercise "due diligence until discovery of the facts" of its antitrust claim.²⁴

²⁴ Bearing on *Dayco's* third element of the fraudulent concealment exception, "(3) plaintiff's due diligence until discovery of the facts," defendant N&W argues in its motion:

[T]he argument that Pinney knew nothing of an alleged conspiracy [cannot] discharge Pinney's obligation to pursue a remedy for the injuries of which it was undeniably aware. At

(footnote continues)

D.

Having concluded that genuine issues of fact exist as to each of the three elements which under *Dayco, supra*, plaintiff must ultimately prove to establish fraudulent concealment, the court overrules the motions of defendants for partial summary judgment based on Clayton 4B's four-year statute of limitations.

(footnote continued)

bottom, the instant lawsuit is based on Pinney's inability to obtain the iron ore rate it sought from Penn Central and later Conrail. It had available to it, and was aware of, a variety of possible remedies for the rate denial—a formal complaint to the ICC, a complaint to the Ohio Public Utility Commission, and a possible antitrust action against Penn Central. If Pinney had pursued either a formal ICC complaint or an antitrust action against Penn Central, it would have been entitled to discovery which could have permitted Pinney to obtain information upon which it might have relied to amend its complaint and broaden its allegations as warranted. Having failed to pursue any of these remedies and choosing instead to sit idly upon its rights for nearly twelve years, Pinney must now be barred from pursuing its stale claims.

Under the fraudulent concealment doctrine, plaintiff's present antitrust claims based on an alleged railroad antitrust conspiracy are not "stale" unless Pinney knew the operative facts of its present cause of action or could have discovered them prior to September 17, 1976 through due diligence. This court has concluded that a genuine issue of material fact exists as to whether plaintiff could have done so. Plaintiff's alleged failure to pursue, for whatever reasons, other potential resolutions of a dilemma which it asserts resulted from defendants' alleged conspiracy, does not preclude it from raising the equitable doctrine of fraudulent concealment in the instant case. As this court ruled in its memorandum and order of today relating to defendants' motion to dismiss on jurisdictional grounds:

The rights which [plaintiff] claims under the antitrust laws are entirely collateral to those which [plaintiff] might have sought under the [Interstate Commerce Act].

Carnation Co. v. Pacific Conference, 383 U.S. 213, 224 (1966). Plaintiff's alleged failure to pursue any potential ICC remedies does not prevent it from seeking antitrust damages based on a conspiracy to eliminate it as a competitor.

II.

In its motion to dismiss plaintiff Pinney's complaint on statute of limitations grounds, defendant N&W asserts that "after months of discovery, Pinney has presented no evidence that N&W was a party to the alleged conspiracy." The court separately addresses this contention to determine whether a genuine issue of material fact exists as to N&W's participation in the antitrust conspiracy alleged by plaintiff. *Smith, M.D. v. Northern Mich. Hospitals*, 703 F.2d 942 (6th Cir. 1983), provides an analysis to aid in determining whether a genuine issue of material fact exists as to N&W's alleged participation in the conspiracy:

The lesson learned from [*Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1972)] and [*First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)] is that, although the court should treat antitrust plaintiffs leniently in examining their proofs for issues of fact on a summary judgment motion, those proofs must nonetheless provide some factual basis upon which the conspiracy and intent elements may be reasonably inferred. Once the defendant has adequately rebutted the plaintiff's allegations by establishing legitimate alternative explanations for its conduct which disprove the inferences the plaintiffs seek to draw, then the plaintiffs must come forward with some "significant probative evidence tending to support the complaint." *First National Bank*, 91 U.S. at 290.

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90 (1968), stresses that Rule 56(e) has not been "read out of antitrust cases." A plaintiff may not "get to the jury on the basis of the allegations in [its] complaint[]." There must be "significant probative evidence tending to support the complaint." This is the bottom line of the *Smith* ruling, *supra*.

The court first turns to the events of 1964-1968. N&W obtained virtually all of its present Lake Erie area operations.

including its only iron ore dock facility on Lake Erie at Huron, Ohio, through its acquisition in 1964 of the New York, Chicago and St. Louis Railroad, otherwise known as the Nickel Plate Road. It is determined that N&W did not participate in the alleged formation of the conspiracy between 1956 and 1958, since at that time it had no docks on Lake Erie. Moreover, the record is barren of any evidence that N&W participated in the alleged conspiracy either prior to its acquisition of the Huron ore dock in 1964 or during the period 1964-68.

N&W argues that at all times subsequent to its acquisition of the Huron dock, it acted independently and solely with regard to its own competitive interests. In May 1968, Youngstown Sheet & Tube Company (YS&T) requested that N&W consider unloading ore "at Huron for ground storage, to be reloaded into rail cars and shipped throughout the winter months." A May 21, 1968 memo from W. Bales, N&W's then assistant district manager of coal traffic, to A. E. Suter, N&W's then manager of sales and services in the coal department, observed that the ore was to arrive in a self-unloader. Bales noted that YS&T requested to pay only the handling charges from stockpile to rail car, and not the regular bulker vessel unloading charges. Bales observed that YS&T "had requested the same consideration from the Penn Central and the B&O and had been turned down by both parties." A May 23 1968 interoffice memorandum documents that after discussion among several N&W executives, N&W determined that they would "not charge for handling from the hold to storage area" but would make a charge "for whatever other service is performed, *i.e.*, loading from storage to car."

Several documents show that officials of other railroads immediately reacted to N&W's decision. In an interoffice memorandum of May 27, 1968, J. Schmuck, Jr. of N&W stated to E. J. Siemon, N&W's then general coal traffic manager —rates:

As I stated in our last conversation Friday (24th), Bob Weis, Penn Central, was very much concerned because N&W "had made a deal" to make no charge for use of dock or for unloading boat and placing ore into storage.

Nonetheless, Schmuck concluded:

I do think we should consider the publication of a charge for use of dock by self-unloader, but certainly we could not publish a charge for service not performed.

A B&LE interoffice memorandum of July 25, 1968 written by R. F. Joyce reveals that N&W's action prompted the calling of "a special meeting" on July 24, 1968 to discuss the matter of handling charges for self-unloaders. Joyce reported:

Bob Wooters [B&LE], John Thorney [B&O], and Bob Weis [Penn Central] were very vocal in their opposition to the N&W position in this matter and pointed out the dire consequences for the railroads handling ex-lake iron ore. Bob Weis stated that they refused the same movement over Pinney Dock at Ashtabula and Thorney stated he had declined to establish a rate for the movement of 10,000 tons that Grand River Lime Company at Grand River, Ohio proposed to store for Youngstown Sheet and Tube Company.

The July 26, 1968 memorandum prepared by Bob Weis of Penn Central confirms and elaborates the exchange:

I informed those present that we had been requested to establish line haul Ex-Lake iron ore rates from the Pinney Dock at Ashtabula and had refused to do so as a matter of policy. Mr. Thorney of the B&O said his Company has a similar request from the Grand River Lime Company to publish rates from the dock of that Company at Fairport, Ohio and that thusfar he has resisted pressure from the shipper and his own merchandise people to do so. Youngstown Sheet & Tube Company has offered the B&O 10,000 tons for movement over the Grand River Lime Co. dock because the N&W is unable to accommodate any more than the initial 60,000 tons. I fear the B&O may succumb and open up its Ex-Lake iron ore rates to ore or pellets unloaded at

private docks. If they should do so, we would be required to alter our position with respect to rates from the Pinney Dock in order to be competitive.

Despite such opposition,

Mr. Siemon advised that N&W is steadfast in its position regarding the charges on the movement through Huron and has cleared the matter through their law department.

In his memorandum of the July 24, 1968 "special" meeting, Mr. Siemon noted that "[i]t was apparent the members present agreed our action was legal but they felt it was in violation of a general verbal understanding in prior meetings." In his deposition testimony, referring to what he was told about that verbal understanding, he stated:

I was told that the determination had been made at the Coal Committee that the same charges would be assessed for self-unloaders as from bulk vessels.

Asked, "Well, what did you do after learning of that determination?" he answered:

A. Nothing whatsoever. I merely said that was the legal charge in the tariff and that we were not going to be bound by any such understanding or agreement.

N&W adhered to its decision. A. E. Suter's letter of May 26, 1970 recorded that "a total of 51,857 gross tons [of ore] were placed on [N&W's] dock by the self-unloaders 'Algorail,' 'Roy A. Jodrey,' and 'E. B. Barber' in late 1968." No charges were assessed for unloading the ships.

In 1969, N&W decided "not to handle ore from self-unloaders this year at Huron, Ohio" as is shown in an April 11, 1969 letter from E. J. Siemon to W. D. Roe, N&W's then assistant vice-president of rates. The parties disagree as to the reasons behind N&W's decision. Pinney argues:

The opposition of the railroads and the threat to cut their own rates ultimately proved successful. On

April 17, 1969, B&O advised B&LE that "N&W has taken a different view of this matter" and that "N&W has let it be known that normal handling charges will be applied in all instances." Indeed, in 1969 N&W refused to continue to handle YS&T iron ore over its Huron dock. . . . Plainly, N&W was coerced into foregoing its statutory right of independent action, so that the conspiracy could be maintained.

In response, N&W argues that its decision to not accept self-unloaders at Huron in 1969 was an independent business decision resulting from "physical and potential operational problems which resulted from acceptance of ore from such vessels. . . ." Uncontroverted claim sheets and letters of N&W show that when the 51,857 tons of ore were placed in the Huron dock's storage pit, "the ground would not support the . . . weight and created a ground wave. This ground wave threatened to push out a railroad track, and possibly [N&W's] dock." Some of the ore sunk underground and "was embedded in the dock base and was not recoverable. . . ." As a result, N&W was forced to pay a claim of approximately \$18,000 to YS&T on a shortage of 1,761 gross tons of iron ore.

The events that surrounded N&W's 1969 decision not to handle iron ore from self-unloaders are chronicled by A. E. Suter, general coal traffic manager—sales and service for N&W in Cleveland, in an uncontradicted affidavit. In his concluding paragraphs he stated:

In March of 1969, I informed William Grover of YS&T, due to the ground instability at Huron and the consequent loss of ore encountered in 1968, N&W could not, at that time, commit to accept further shipments at Huron in self-unloaders.

He stressed:

My decision was based solely on the condition of the Huron facility, and did not involve any consideration of the views of any railroad other than N&W.

Mr. Suter then recounted the soil test findings and the consequences:

In April of 1969, I received word from N&W's Engineering Department that test borings conducted by Herron Testing Laboratories, Inc. of Cleveland indicated that the ground in Huron's northern storage area was too unstable to support piles of iron ore pellets. Since this area was Huron's only potential storage area within reach of self-unloader booms, the test results meant that N&W was incapable of accepting additional self-unloaders at Huron without making improvements to the facility.

Mr. Suter further observed that he decided that N&W would not handle self-unloaders following the 1968 ore slippage incident. Mr. Suter states:

My decision was based solely on the condition of the Huron facility, and did not involve any consideration of the views of any railroad other than N&W.²⁵

Several internal memoranda support Mr. Suter's statement.

Based on this uncontradicted evidence, the court determines that N&W's decision in March-April 1969 not to handle self-unloaders at Huron was an independently exercised business judgment. However, plaintiff submits additional evidence which it argues reveals that N&W participated in the conspiracy beginning later in 1969.

Letters and memoranda reveal that N&W attended "informal discussions" in 1969 concerning handling charges on iron ore moving in self-unloaders. A June 6, 1969 memorandum prepared by B&LE's R. F. Joyce indicates that E. J. Siemon participated in such an informal discussion on June 3, 1969. At

²⁵ Similarly, E. J. Siemon stated at his 1982 deposition:

... the decision, I will say, that we could not handle [self-unloaders] had in no way any determination by the fact that the Penn Central did or did not handle them. That was our own physical capability at the dock or incapability.

the discussion, Thorney (B&O) and Siemon (N&W) asserted that Penn Central was handling self-unloaders at Ashtabula without assessing "normal handling charges." In a B&O internal memorandum, J. K. Thorney states he "brought this matter up informally at our Coal, Coke & Iron Ore meeting held in New York on June 3 in view of the fact we have learned that the Port of Conneaut is considering two plans for expanding their ground storage facility." He then

[r]eminded all of the roads represented at the meeting of the unanimous agreement (in 1958) which was reached between all rail lines serving docks—that should any self-unloaders be offered—all lines operating ore docks would uniformly interpret their tariffs and assess all of the present handling charges published in such tariffs.

Mr. Siemon, the N&W representative on the CCIOC special committee, as well as the other railroad representatives, thus received a specific reminder of the terms of the railroad's "unanimous agreement" (in 1958) that the "present handling charges published in such tariffs" for bulkers should be applied "should any self-unloaders be offered." According to Thorney's minutes, no representative apparently took issue with the agreement.

Thorney then concluded, "The lake carriers representatives were practically silent when I inquired what their positions would be in connection with this matter for the future." He added:

Most of them, I am sure, have no knowledge as to what course their management would take—merely stating that this large anticipated pellet movement can be several years away.

In late August 1969, Thorney called for another informal meeting which was not to be "listed on the regular docket." The meeting was held on September 11, 1969, and a possible "reissue of ex-lake iron ore tariffs" was discussed. E. J. Siemon attended as N&W's representative. B&LE's Joyce reported in

his minutes of September 12, 1969 that Thorney (B&O) was "concerned that B&LE or other lines may be contemplating a change in the handling charges by unilateral action." Following these comments, Joyce "distribute[d] copies of [B&LE's] proposed tariff in manuscript form to the directly interested lines." Joyce recorded:

After I outlined the reasons for placing the handling charges in a separate item and our desire to make no change in such handling charges at this time, all agreed that the changes would appear to serve a useful purpose although the various lines desired to make studies of the subject.

Concerning this same September 11 meeting, E. J. Siemon wrote W. D. Roe on September 22, 1969:

The above subject [handling charges on iron ore discharged by self-unloading vessels; also reissue of existing ex-Lake ore tariffs] was discussed after conclusion of the CC&IO—ER meeting in New York September 11, . . . [T]he B&LE has in proof form, reissue of their Tariff 380-B from Conneaut, Ohio to Ohio and Pennsylvania in which the handling charges have been published separately but with no other changes.

It was concluded that this subject would be discussed further whenever any line was ready to reissue their comparable tariffs.

Subsequently, on February 16, 1970, R. F. Joyce

published the reissue as B&LE Tariff 380-C.I.C.C. 1545, to become effective March 21, 1970, reflecting in all instances present rates and charges. . . .

The special committee meetings of July 3, 1969 and September 11, 1969, and the actions taken at and pursuant to those meetings are probative evidence of the existence of the alleged conspiracy. Those meetings, Mr. Siemon's participation therein, and his notification to N&W's Roe of the action taken at the September 11 meeting would permit the trier of fact to

find that by September 22, 1969, N&W had become an active partner with other ex-lake railroads in protecting the 1958 agreement which extended bulk handling charges to self-unloaders. This is permissible despite N&W's independent action in 1968 in not assessing unloading charges for YS&T's discharge of iron ore at Huron Dock's north storage area.

N&W's willing participation in the self-unloader handling charges agreement may be further inferred by the trial of fact from W. D. Roe's office memorandum of March 3, 1970:

In 1969 we advised YS&T we would not be able to handle the self-unloader traffic and they approached then Penn Central to handle the ore through Ashtabula, and Penn Central followed our lead and assessed the same charges as we had the previous year.

Penn Central has now been asked by a shipper, presumably Youngstown Sheet and Tube, what charges, if any, will be protected during the coming season and Joe Bodell wants to establish some specific charge for movement of ore to the dock from self-unloaders when no actual service is performed by the carrier. He is thinking in general terms of something around 40 [cents] per gross ton.

Increased movement of ore in self-unloaders is predicted for the future and we agree that some charge should be established. . . .

The balance of the memorandum reads:

The Chairman of the CC&IO Committee is being asked by Penn Central to have the port Lines' representatives discuss this matter after the March 12 committee meeting, and in the meantime Bodell has been told that should the N&W receive an inquiry from Youngstown Sheet and Tube, we will not tell them that we will perform the service this year without cost, but that the carriers plan to propose some uniform charge for the service in the future.

Thus, Mr. Roe knew of but raised no objection to the "after meeting" discussion of the subject of a uniform self-unloader charge. He also recorded N&W's joinder in a plan to deal with any further YS&T request to deliver iron ore by self-unloader to the Huron dock.

At a "special meeting" of the CCIOC on March 24, 1970, the "port lines representatives" discussed Penn Central's proposal to establish specific handling charges on iron ore received from self-unloading vessels. J. K. Thorney's (B&O) minutes of the meeting state:

The Penn Central feel[s] the carriers should establish a charge for handling these self-unloaders. It is generally conceded that under present tariff publications, which were designed primarily for handling bulk vessels, when the pellets are unloaded by self-unloaders direct to the storage area and by-passes the docks ore machinery, the only charge that could be assessed and defended would be the 38 cents per ton charge for handling from the storage pile into cars.

For different reasons, each of the carrier representatives indicated an unwillingness to commit his carrier to publishing Penn Central's proposed tariff. As R. F. Joyce (B&LE) noted in his memorandum of the meeting:

After Weis offered his proposal, it quickly became evident that committee action on this subject will not be progressed at this time.

B&LE's position was set forth at the meeting by Joyce: "... I advised Weis that while we would undoubtedly agree to publish the required charges if other Lake Erie lines agreed to do so, I had serious reservations about taking such action in the absence of such agreement, considering that we had no immediate need to establish the charges."

According to Joyce,

representatives of B&O indicated they have serious reservations about publishing such charges or they do

not anticipate handling self-unloader cargoes of iron ore.

In addition, Thorney reported in his minutes:

The N&W advised they could not and would not handle any self-unloaders at Huron.

Similarly, B&LE's Joyce noted:

Ed Siemon advised that N&W would not publish the charge until such time as the need would arise, and they do not desire to handle any more self-unloader cargoes through Huron in 1970 or in the immediate future.

In short, although N&W and each of the other carriers expressed individual positions, the trier of fact might find that they had actually joined together in informing Penn Central that they would not at that time publish the proposed self-unloader tariff. As Thorney summed up:

The Penn Central was left in a position of either making an independent announcement or else handling on the same basis as last year, *i.e.*, assessing only the storage to car charge of 38 cents.

Thus, rather than finding that N&W acted entirely on its own, the trier of fact could conclude that N&W had combined with the other carriers in a united position and that this explains Penn Central's failure to issue the proposed tariff.²⁶

²⁶ C. S. Baxter, chairman of the Traffic Executive Association—Eastern Railroads, recorded in a letter to various road executives marked "PERSONAL":

The special committee met on March 24 and after discussing the subject in detail, the special committee recommended that no action be taken on the matter at this time, with the understanding that the subject would not be brought back for consideration unless and until the Chairman is specifically requested to do so.

Under the circumstances, no further action will be taken on this subject until a member requests that the subject be brought back for further consideration.

Moreover. N&W's position on December 29, 1970, as shown in W. D. Roe's office memorandum of that date, would permit the trier of fact to find that its concerted activity with the other port lines continued. In late 1970, Penn Central proposed "to establish a charge of \$1.41 g.t. . . . for handling ex-lake iron ore and iron ore pellets discharged from self-unloading vessels at railroad-owned docks at Ashtabula Harbor, Cleveland, and Toledo, Ohio." Discussing this proposal, Roe's memorandum states:

I ascertained from Bill Bales in Cleveland that we were in no better position to handle this traffic now than last year and if contacted by YS&T, we will merely decline to accept the traffic. If YS&T wants to utilize dock space at Huron for discharge of ore into the trough area for movement into the storage area by the N&W, we will quote \$1.41 gross ton for handling the ore.

Also, concerted rather than independent action might be found by the trier of fact in Roe's response to Bodell of Penn Central:

Bodell stated the Erie Lackawanna and the Bessemer and Lake Erie had agreed to protecting the \$1.41 charge and he had not yet heard from the B&O. *I told him I thought the charge was somewhat excessive, but would not undercut his position without first contacting him.* [Emphasis added.]²⁷

²⁷ Bodell's understanding of Roe's statements is set forth in his letter to G. R. Wallace of January 21, 1971 setting forth the position of the various lake lines:

N&W—won't publish but will not under cut us. Will tell customers they cannot handle self-unloaders satisfactorily.

Roe's agreement not to undercut Penn Central's charge is further corroborated by the following deposition testimony of W. B. Bales of N&W:

Q. Were you told that you were not to undergo [undercut] the charge of the Erie Lackawanna, Bessemer, or any other railroad without first contacting Mr. Bodell?

A. I would not have discussed this item with our customer.

Q. But you were aware that that was the policy which was to apply to your dealings with customers?

A. The chief rate officer for this commodity had said that, and I would certainly have followed his wishes.

At least one port line representative sent to N&W rate personnel a letter which stressed the carriers' discouragement of self-unloader handling of iron ore. In a March 19, 1971 letter, George Wallace, Penn Central's vice president of coal and ore, wrote to W. D. Roe and executives of C&O, EL and B&LE:

Because of our mutual interest, I am sending you copies of correspondence received from Wilson Marine Transit together with my reply. This has to do with the critical question of dock charges for handling iron ore.

You should also know that we have been unofficially advised that revised plans call for taking ore programmed to be carried in self-unloaders this season—an active and acrimonious subject—directly to steel company water-side furnaces for direct delivery.

We are taking steps to withdraw any suggested bases for handling these vessels and we propose, in event of any future offerings of self-unloader tonnage, to consider such a vessel the same as bulk carriers until such time as generally accepted rates and charges for specialized vessels can be agreed upon and published by the lines having railroad-owned dock facilities.

A "confidential" note from Charles E. Schroeder of C&O/B&O to his superior, G. A. Sandmann, indicates that an "informal discussion . . . concerning the Litton self unloader" was held on April 29, 1971 at Pittsburgh. W. D. Roe and E. J. Siemon, Jr. of N&W, along with executives of other roads, are listed as attending and participating.

B&O/C&O's minutes reflect numerous statements of each road. In part, B&O/C&O stated: "We are considering this boat in two phases." Regarding phase II (possible acquisition of ground at Lorain by Litton to install their own facilities), B&O/C&O asked "if Huron is considering handling this boat." N&W replied, "Huron cannot handle this boat without modi-

fication of dock facilities." Pertinently, in a later exchange. B&O/C&O stated, "We cannot defend charging for services not performed." "Negative reaction of the lines" to the B&O/C&O two-phase proposal was "immediate and vocal," reported B&LE's Joyce. The B&O/C&O minutes conclude:

From various roads, all being basically opposed to the B&O/C&O thinking. Statements were again made that other Lake Erie docks would drop their charges on bulk ships to meet what we do in this case and the PC mentioned again the similarity to what would happen if they drop the export coal rate to \$4.00.

G. A. Sandmann's personal notes of the April 29 meeting record in pertinent part:

Any charge which we make which is less than .65 [cents] per gross ton will trigger the following repercussions:

(1) *All the roads are unanimous* that they will immediately reduce their charges applying on conventional bulk port traffic to whatever charge is made for self-unloader, so that their customers will not be placed in a competitive position with Litton. [Emphasis added.]

These memoranda quotes, together with related memoranda not here quoted, raise a genuine issue of material fact as to N&W's claim that it pursued the same independent course after 1968 which it followed in 1968. Thus, the documents submitted by plaintiff, examined in the light most favorable to it, constitute probative evidence that N&W may have participated in the alleged railroad antitrust conspiracy beginning at least as early as September 1969.

In rebuttal, N&W offers evidence showing that it "repeatedly sought an economically justifiable solution for its inability to accept self-unloaders at Huron throughout the post-1968 period." The relevant evidence shows that N&W conducted studies evaluating the relative costs and benefits of modernizing, relocating, or selling or leasing Huron's iron ore oper-

ation. N&W argues that "the crucial factor in [its] decision not to invest large sums in modernizing the facility was the projected failure of such improvements to generate additional profitable ore traffic at a level which would yield an acceptable return on the investment."

The evidence offered by N&W is relevant in determining whether N&W was acting entirely on its own during the period at issue.²⁸ However, such evidence does not as a matter of law negate the inference permitted by plaintiff's evidence that to discourage the use of self-unloaders in handling iron ore, N&W

²⁸ N&W provides the court with evidence of later N&W action in support of its contention that it acted independently throughout the period at issue. As an illustration, N&W cites to a B&LE interoffice memorandum written by R. B. Wooters on April 30, 1979 covering "iron ore handling charges at Lake Erie ports." In pertinent part, the memorandum states:

Today we called Ed Siemon of NW and without giving him much opportunity to express an opinion, gave him both barrels of our argument on where to apply the increase. After we were finished, he told us that what we had said was all very interesting and that as far as P&C Dock and Conrail were concerned he thought it would be fine for them to apply whatever increase they wanted and to whatever portion of the charge they wanted to apply it to. On the part of the NW, however, he was firmly convinced that there was no room for any increase and that he was also not going to match Conrail's reductions in the storage ore because he would not be able to cover his costs. When I told him that Conrail had justified its action on the basis of reduced costs because of using front-end loaders to move material around, he said that they must be better operators than NW because NW had been using front-end loaders and not the ore bridge for more than two years and could not see such large savings.

Similarly, N&W presents evidence that in April 1978, when Conrail extended a commodity iron ore rate to Pinney Dock, N&W quickly joined in. A May 3 letter from N&W to the Traffic Executive Association—Eastern Railroads announces

N&W's intention to participate in rates and routes and divisions from Pinney Dock to the same extent as we presently participate from CR's [Conrail's] docks at Ashtabula, Ohio.

Such evidence is relevant to the issue of whether N&W was a member of the alleged conspiracy. However, the evidence does not as a matter of law override the evidence in the present record which shows that N&W may have participated in the alleged antitrust conspiracy.

may have been actively meeting, working and exchanging information with other alleged antitrust conspirators.

Plaintiff Pinney further maintains that defendant N&W's alleged conspiratorial activities carried on throughout the 1970's into the present. As support, Pinney presents evidence that it began handling self-unloaders in 1975 when the steamship "Jackson" docked at Pinney in October. The iron ore pellets were carried by truck from Pinney to Youngstown Sheet and Tube's Brier Hill facility. Various railroad documents show that the railroads spread the news of the trucking operation back and forth, and private conversations as to what could be done occurred. An October 24, 1975 interoffice memorandum written by E. J. Siemon, Jr. states that Bob Wooters of B&LE advised N&W about the trucking. Siemon continued:

No rail rate action is contemplated to meet this trucking at this time.

Less than two weeks later, on November 3, 1975, J. P. Royston of Penn Central wrote:

I talked with Charlie Schroeder, B&O, today about the self-unloaders at Pinney Dock for YS&T. According to Schroeder, B&O-C&O has no intention of meeting the Pinney—truck competition by a rate adjustment.

Royston also recorded a conversation with "Bill Bales, N&W, about the same subject:"

[Bill Bales] tells me Huron may be ready within a month to handle storage ore. He is not sure they would handle any self-unloaders because the portion of the dock which must be used may not be stable enough. In any event, no decision has been made to publish handling charges from self-unloaders—and if they do, the charges will be on the normal basis.

Shortly thereafter, the railroads convened to consider the trucking of iron ore from Pinney Dock. Several exhibits describe a special meeting of the Coal, Coke and Iron Ore Committee held in Washington, D.C. on July 6, 1976 to discuss

the Pinney trucking situation. A special committee, including N&W representatives, was assigned to investigate the situation. George M. Riley of Chessie observed in a July 9, 1976 letter:

It was the feeling of the group, which met in Washington, that the survey should be conducted by other than rate officers, so as not to give any impression that the carriers were considering some type of rate action. . . .

Several meetings of the committee were held. N&W submitted for the group's consideration statistical summaries of trucking firms in the Ashtabula area and studies of Pinney's ore capabilities. N&W argues that "Pinney cannot reasonably contend that the mere study of trucking costs could cause it harm." However, Pinney submits evidence which it argues shows that the study was aimed directly at eliminating Pinney's competition.

A letter of Charles Schroeder of Chessie written on September 23, 1976 listed a series of methods which the railroads might employ to "fight back." Such methods included

perhaps arrang[ing] meetings between our executives and those of steel companies to discuss the possible elimination of some services if trucking persists.

Additionally, David L. Foster, N&W's representative to the committee, acknowledged that rate discussions occurred at the study meetings. In a letter of September 22, 1976 to W. D. Roe, Foster stated:

. . . unanimous agreement exists that rate action alone would be a counterproductive and ineffective response, and that unauthorized use of railroad-owned hopper cars by steel companies for intra-plant moves must stop.

In a letter of September 28, 1976 to Messrs. Roe and Siemon, Mr. Foster transmitted his thoughts as to "the most important conclusions to be drawn from [the committee's] work." A portion of his letter reads:

Secondary Response. In addition to pioneering improved transportation methods with the steel industry, there is no reason why the railroads cannot, in the interim, make life as difficult as possible for the truckers in an effort to hamper their ability to compete and to retard their growth. Several avenues of seeking regulatory enforcement and arousing public opinion against them are suggested in the report.

Fight Back. If the industry should make an effort in good faith as described above as a recommended primary response and ultimately fail, railroads can take certain actions against the steel companies. Steel plants have long caused excessive car detention through use of cars for in-plant storage and intra-plant loading. Such costs to the railroads will become increasingly large as the cost of new equipment inexorably rises. Likewise the labor costs associated with free intra-plant switching have caused the joint switching charges per car in the Youngstown area to skyrocket. At one time railroads could condone and perhaps even justify such free services as a tool in procuring lucrative business from the steel mills. Much finished steel already moves by truck. Faced with recent and potential inroads into profitable ore and coal traffic, there is a very real question in my mind whether such costly service amenities of ore can continue to be supported by the railroads.

Responding to this evidence, defendant N&W argues that the study group's recommendations were "unsolicited" and

the record is clear that no action was ever taken to implement those recommendations resulting in a[n] injury to Pinney or anyone else. . . . Indeed, the record is clear that N&W's management simply ignored the recommendations.

As support, N&W points to the deposition testimonies of Siemon and Roe. At E. J. Siemon, Jr.'s deposition, the

following exchange ensued when Siemon was questioned about Foster's September 28 letter:

Q. Did you discuss that letter or any of the matters raised in Mr. Foster's letter with anyone?

A. I probably walked into Mr. Roe's office and said something along the line of, who in the world does David Foster think he is in making recommendations far beyond the scope of the job he had to do? Some comment like that.

With respect to the September 28 letter, Mr. Roe testified:

Q. Did you have any discussions with Mr. Foster concerning any of the matters referred to in this letter?

A. Not that I recall.

Q. Did you discuss the report of the committee with Mr. Foster?

A. Not that I recall.

Q. Did you discuss it with Mr. Siemon?

A. I cannot recall any discussion with Mr. Siemon.

Q. Was any action taken by Norfolk & Western as a result of the conclusions drawn by Mr. Foster in Exhibit 22?

A. Not that I recall.

Q. ... Was anything done along those lines by anyone?

A. I can't speak for anyone. But I recall nothing being done by the N&W Railway.

The testimony of Siemon and Roe tends to support N&W's contention that the recommendations of the trucking study group were not carried out. However, Pinney presents evidence to rebut the assertions of the N&W officials that no actions were taken. A letter of September 14, 1976 written by Charles Schroeder of Chessie reveals that the suggestions in Mr.

Foster's letter may have been carried out simultaneously with the group's efforts:

Since our last meeting, trucking of this ore has stopped to Republic's Warren plant and such ore delivered has been cleaned up. Hopper cars leased to steel plants, which were being used to move the trucked ore to ore bridge, have been quietly removed "account the growing demand for them in coal service." Cars delivering coal to the mills, and then being used for multiple moves of trucked ore and stone, are being more closely watched by the Joint Trainmasters and additional charges assessed. Other discreet operations involving cramping the trucking of ore over Ohio 11 are being pursued.

In addition, an internal Chessie memorandum of October 18, 1976 reveals that C. C. Manning of N&W participated in a committee meeting in Pittsburgh on October 14, 1976 with rail executives representing B&LE, Conrail, P&LE and Chessie. The memorandum states:

The Committee reviewed the reports that had been made by the group [the trucking study committee] that C. E. Schroeder had been working with and it was the feeling of all present, with the exception of the P&LE, that we should take no action on rate reductions at this time, but should be keenly aware of the situation that may require action at a later date. The B&LE, ConRail, N&W and Chessie feel that making any adjustment to this territory from Ashtabula, Ohio would have violent collateral affects on other movements of iron ore from all Lake Erie origins, as well as, import ore from North Atlantic ports. ConRail was extremely concerned about their 3 million annual gross ton iron ore movement of 65 miles from Philadelphia to Bethlehem, Pa. and the effect any reductions from Ashtabula would have on this movement.

P&LE stated that indications are that Sheet and Tube Company are committed to truck handling of

iron ore from Pinney Dock to the Brier Hill Works, and there is no assurance that any adjustment in rates from Ashtabula would capture this movement via rail. The end result being that no rate adjustment be made at this time as any reduction to the Mahoning Valley would not increase rail participation to these points, and would severely effect all other iron ore rates in the eastern territory.

These documents indicate that at least some of the recommendations of the trucking study group may have been undertaken and that N&W was aware of and may have participated in these actions. Also, the evidence would permit the trier of fact to conclude that the trucking study was aimed at Pinney and furthered the alleged conspiracy to discourage the carriage of iron ore in self-unloaders and Pinney Dock's handling and transshipment of iron ore.

Considering the entire record and the inferences therefrom, this court concludes that the plaintiff has presented "significant probative evidence," *First National Bank and Smith, supra*, to support the allegations in plaintiff's amended complaint that defendant N&W joined and participated in the alleged conspiracy. With a genuine issue of material fact existing, N&W's separate motion for summary judgment based on its assertion that it did not participate in the alleged antitrust conspiracy is overruled.²⁹

²⁹ Defendant N&W has called to the court's attention the oral opinion of District Judge Barrington D. Parker in granting "N&W's motion for judgment of acquittal" and in ordering "a directed verdict of acquittal at the conclusion of the government's case in *United States v. Norfolk and Western Railway Co.*, Crim. No. 81-396 (D.D.C. 1982)." Not aware of whether all the evidence heretofore reviewed was presented in the criminal prosecution, but recognizing the differing burden of proof facing the government in that prosecution, and noting that Judge Parker granted the acquittal motion and ordered a directed verdict at trial after the government had completed its presentation of evidence, the court concludes that Judge Parker's ruling is not presently apposite.

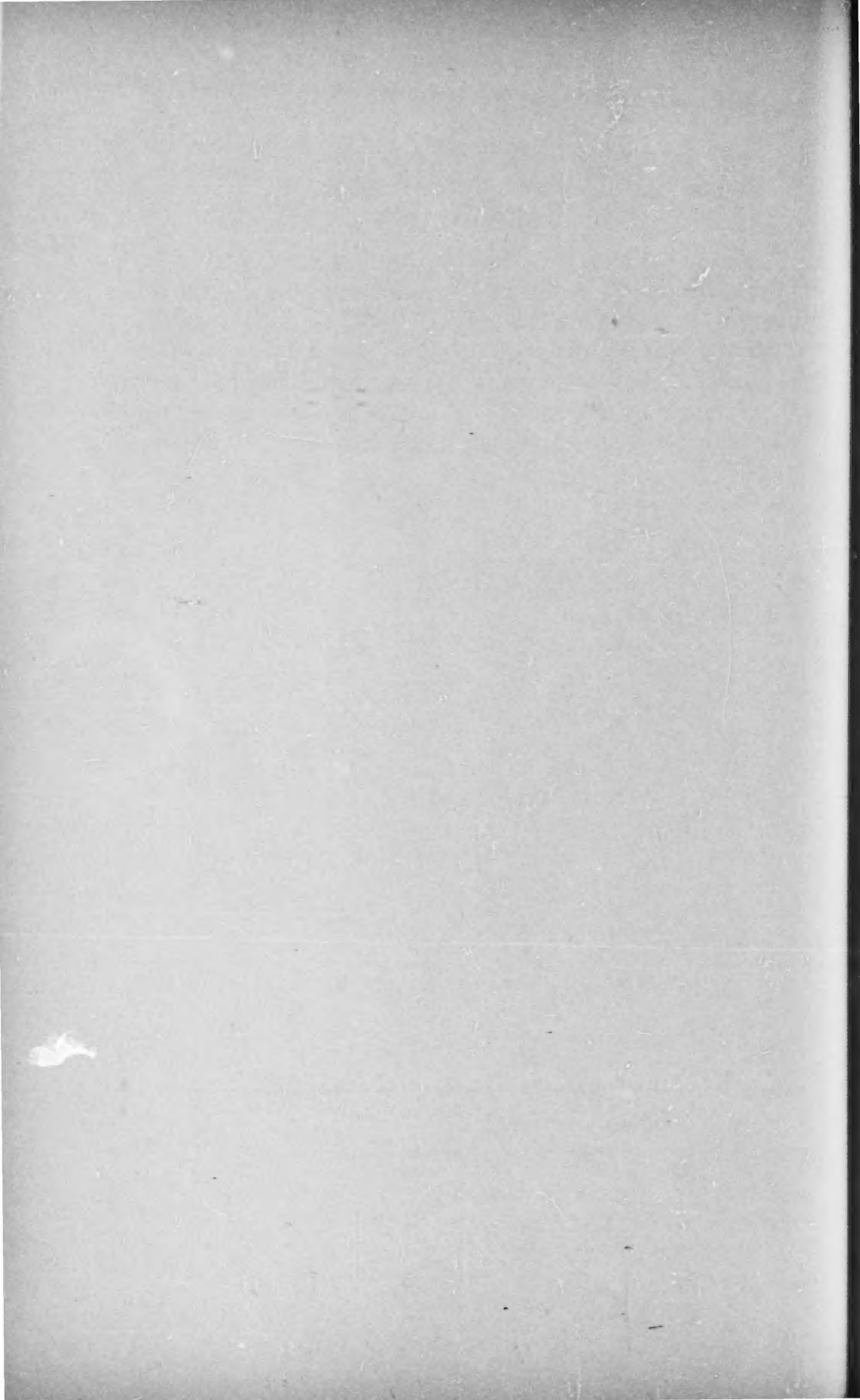
III.

On the grounds and for the reasons set forth in part I, the motions of defendants Chessie and B&LE for partial summary judgment based on Clayton 4B's four-year statute of limitations are overruled. On the grounds and for the reasons set forth in Parts I and II, defendant N&W's motion for summary judgment based on the statute of limitations and its contention that it did not participate in the alleged conspiracy is overruled.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. DISTRICT SENIOR JUDGE

APPENDIX F



**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

C80-1733

PINNEY DOCK & TRANSPORT COMPANY,
Plaintiff,

v.

PENN CENTRAL CORPORATION, et al.,
*Defendants and
Third-Party
Plaintiffs,*

v.

CONSOLIDATED RAIL CORPORATION
*Third-Party
Defendant.*

MEMORANDUM AND ORDER

THOMAS, Senior Judge

On June 21, 1983, this court overruled separate dismissal motions which challenged this court's jurisdiction. Filed by defendants Baltimore & Ohio Railroad Company (B&O), Chesapeake & Ohio Railway Company (C&O), CSX Corporation, Chessie Systems, Inc. (sometimes collectively referred to as Chessie), Norfolk & Western Railway Company (N&W), and Bessemer & Lake Erie Railroad Company (B&LE), these motions were treated as Rule 56 summary judgment motions. Defendants Norfolk and Western Railway Co. and Bessemer and Lake Erie Railroad move for reconsideration of the court's order, or in the alternative, for certification of immediate appellate review pursuant to 28 U.S.C. § 1292(b). The other defendants also seek such certification.

I.

The court takes up N&W's argument, repeated from its jurisdictional brief:

Quite apart from the fact that the conduct alleged in the Complaint is [expressly] immune from the operation of the antitrust laws, the Interstate Commerce Commission has exclusive jurisdiction over the subject matter of the complaint.

N&W correctly notes that the court incorrectly included N&W within the court's statement that "each defendant argues that alleged activities underlying plaintiff's claims are . . . impliedly immunized from the antitrust laws by the Interstate Commerce Act. . . ." While the other defendants made the implied immunity argument, N&W did not. In part I of its June 21 jurisdiction opinion (cited as *Jur. Op.*), this court stated that it first addressed "defendants' separate but parallel contentions that 'the complaint should be dismissed because the matters at issue are within the exclusive jurisdiction of the Interstate Commerce Commission.'" However, this court then treated defendants' argument "more precisely" as a contention that "the existence of the Interstate Commerce Act impliedly immunizes them from plaintiff's present antitrust action." Hence the court did not directly deal with the "exclusive jurisdiction" argument of N&W and other defendants.

In *U.S. Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 478-79 (1932), the Court observed that the district court dismissed the "amended bill on the ground, principally, that the matters complained of were within the exclusive jurisdiction of the United States Shipping Board, under the Shipping Act of 1916," 46 U.S.C. § 801-42. The Court stated that the Shipping Act bore "a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." *Id.* at 480-81. The Court drew upon its Interstate Commerce Act decisions in sustaining dismissal of the amended bill. The plaintiff's complaint had sought "to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Antitrust Act."

For guidance in dealing with the jurisdiction question, this court turns directly to decisions which relate to the Interstate Commerce Act (formerly called the Act to Regulate Commerce), rather than to the Shipping Act (*Cunard*), or to other administrative acts.¹

The oft-cited case of *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), lodged jurisdiction under the Interstate Commerce Act primarily in the Interstate Commerce Commission. The oil company sued the railway in state court and recovered damages on its claim that it had paid an unjust and unreasonable rate on shipments of cottonseed. The rate charged was fixed by the duly published and filed rate sheet. The Interstate Commerce Commission had not found the rate to be unreasonable. The Texas Court of Civil Appeals affirmed the judgment, but the Supreme Court reversed it.²

¹ In this memorandum the court does not analyze Supreme Court exclusive jurisdiction decisions advanced by N&W and other defendants which arise under other statutes. While each of the following principal cases involves a holding that the particular administrative agency under consideration had exclusive primary jurisdiction over the plaintiff's claims, although antitrust claims were asserted, this court determines that this court's ruling on N&W's exclusive jurisdiction arguments should rest upon cases decided under the Interstate Commerce Act. *United States Navigation Co. v. Cunard S.S. Co.*, *supra* (affirmed dismissal of an antitrust action. "The remedy is that afforded by the Shipping Act, which to that extent, supersedes the antitrust laws" and "[t]he matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board"); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (United States, charging antitrust violations, obtained injunctive divestiture relief against Pan American in the District Court. The Court reversed, concluding that the complaint should have been dismissed since "the narrow questions presented by this complaint have been entrusted to the Board [Civil Aeronautics Board under the Civil Aeronautics Act]"); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, reh. denied, 410 U.S. 975 (1973) (ordered dismissal of an antitrust action because authority over the activities alleged was vested in the Civil Aeronautics Board by the Federal Aviation Act).

² The Court pointed out that "[t]he Act made it the duty of carriers . . . to charge only just and reasonable rates." It noted that the Act "forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act." *Id.* at 437.

The Court ultimately held that a shipper who seeks reparation predicated upon the unreasonableness of the established rate "must, under the act to regulate commerce, *primarily* invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable." *Id.* at 448 (emphasis added).³

(footnote continued)

Section 8 of the Act provides liability in damages for violations of the Act. Section 9 permits the person or persons "claiming to be damaged by any common carrier subject to the provisions of [the Act] . . . to either make complaint to the Commission . . . or [to] bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of [the Act] in any district court of the United States . . ."

The Court concluded that despite this choice of two remedies, it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in court to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to the redress of such ways, as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character here complained of.

Id. at 442.

³ In *Great Northern Ry. Merchants Elev. Co.*, 259 U.S. 285 (1921), Justice Brandeis classified cases decided by federal and state courts in which the issue of the primary jurisdiction of the Interstate Commerce Commission was adjudicated. In the listed cases "in which the jurisdiction of the court was sustained without preliminary resort to the Commission, the question involved was solely one of construction of a tariff or otherwise a question of law, and not one of administrative discretion." In a second list (headed by *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, *supra*) were cases "where the court refused to take jurisdiction because there had not been preliminary resort to the Commission, the question presented either was one of fact or called for the exercise of administrative discretion." In *Great Northern Ry.*, as distinguished from *American Tie & Timber Co.*, 234 U.S. 138 (1914), the Court noted that "no fact, evidential or ultimate," was in controversy and there was "no occasion for the exercise of administrative discretion." Since the "task to be performed" was "to determine the meaning of the words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts," the Court affirmed the decision of the court below (Supreme Court of Minnesota).

Terminal Warehouse v. Penn R. Co., 297 U.S. 500 (1936), dealt with the interplay of remedies under the antitrust laws and the Interstate Commerce Act. From 1887 to 1931 Pennsylvania and Merchants contracted with reference to warehouses of Merchants located close to Pennsylvania's tracks and terminals. Pennsylvania agreed to maintain tracks adjacent to each of the warehouses and to make stipulated payments "for services rendered by the warehouse in the receipt and delivery of freight." *Id.* at 504. Pennsylvania agreed not to allow "for such services to any other warehouse company in the City of Philadelphia." *Id.* In return, Merchants agreed to prefer Pennsylvania over other lines in the use of Merchant's facilities, to perform loading and unloading services and to collect and remit charges on incoming freight.

The Court noted that the substance of "the whole arrangement was set forth in the tariffs of the railroad filed with the Interstate Commerce Commission and open to the public." *Id.* at 504. Confirming the arrangement in successive decisions, the Commission assumed that "the railroad in making payments or allowances for the handling of the freight was paying for transportation services rendered by an agent." In 1928 the Commission reheard and overruled one of those cases, *McCormick Warehouse Co. v. Pennsylvania R. Co.*, 148 I.C.C. 299. The Commission announced "that a warehouse company doing business under such a contract was consignor or consignee, acting on its own behalf and not as agent for the carrier." As a result, the railroad payments or allowances became "discriminatory" and "forbidden and unlawful" in violation of 49 U.S.C. § 3(1). *Id.* at 505.

Terminal filed a complaint with the Commission and charged Pennsylvania with "unjust discrimination." The Commission granted remedial injunctive relief against Pennsylvania, as requested, but refused Terminal "an award of reparation," because the evidence was "far too vague and indefinite to warrant the conclusion that complainants have suffered actual pecuniary loss attributable directly to the alleged unlawful practices." *Id.* Merchants and other affected warehouses filed bills of complaint in district court against the Commission to vacate the injunctive order. A three-judge court dismissed the

bills of complaint, and the Court affirmed the decree of dismissal. *Merchants Warehouse Co. v. United States*, 283 U.S. 501 (1931).

Denied reparation by the Commission, Terminal brought suit in district court against both Pennsylvania and Merchants Warehouse. Based on the Sherman and Clayton Acts, plaintiff alleged "an unlawful combination in restraint of trade and commerce." On appeal from the district court judgment for trebled damages, the Third Circuit Court of Appeals reversed on the ground that the decision of the Commission refusing reparation was a bar to any claim for damages against either of the defendants in an antitrust damage action as well as under the Commerce Act. While the Court agreed with the Third Circuit (78 F.2d 591) that the denial of reparation against the carrier was "conclusive evidence in favor of the carrier," it was "not such evidence for the carrier's confederate." Since Terminal had not included Merchants as a party to the ICC complaint, although the Court observed that it might have done so, the Court chose to rest its judgment on "grounds applicable to both defendants." 297 U.S. at 511.

After reviewing its decisions in *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922), and in *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), the Court in *Terminal Warehouse* stated that "[w]hat was said in these opinions is precisely applicable here." 297 U.S. at 513. Citing *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, *supra*, *Great Northern Railway Co. v. Merchants Elevator Co.*, *supra*, and other decisions of the Court, the Court declared that "[i]f a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down." 297 U.S. at 513. Holding that "the same considerations are applicable with undiminished force" in a suit under the Clayton Act for damages, the Court continued:

Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved

by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong not canceled or redressed by the recovery of damages for the wrong explicitly denounced.

Id. at 514.

N&W urges that the Supreme Court in *Terminal Warehouse* thereby held that "antitrust damages were available only in cases for which the Interstate Commerce Act did not provide a remedy." This court disagrees. Rather, the Court is understood to be saying that the Interstate Commerce Act provides an exclusive remedy for a consignor or consignee of freight who claims that a carrier by rail is giving an illegal preference to another consignor or consignee and who seeks to cancel the preference and obtain reparation (damages) from the carrier and any aider and abettor because of the preference.

The Court made clear that it was not saying that "never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages." *Id.* at 515. The Court gave an example of an actionable conspiracy and stated that "[i]f a carrier were to give a preference in furtherance of that conspiracy, it would become a participant therein, or so we may assume, the

damages being measured not merely by the consequences flowing from the preference but by those flowing from the conspiracy in all its comprehensive unity." *Id.* at 516. The Court found "no conspiracy to monopolize the storage business to the destruction of Terminal or of others similarly situated." *Id.* To the contrary,

[t]he history of the relation between *Pennsylvania* and *Merchants* indicates strongly that the illegal discrimination, far from being a symptom of a larger combination, was the product of a mistake of law, which was shared for many years by the regulatory commission till the decision in McCormick's case laid down another rule.

Id. These specific findings that no conspiracy had been proved has the effect of limiting *Terminal's* holding to the facts of that case. Hence, the scope of the holding of *Terminal* is not as broad as this language suggests:

The Commerce Act . . . embodies a remedial system that is complete and self-contained For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive.

Id. at 514.

This court concludes that *Terminal* does not hold that the Interstate Commerce Act provides an exclusive remedy for pressing antitrust claims against carriers. Therefore, the Interstate Commerce Commission does not have exclusive jurisdiction to hear and determine plaintiff's present claims.⁴ The plaintiff may seek a "remedy . . . under cover of" the Sherman and Clayton Antitrust Acts. Pinney alleges "another wrong, not canceled or redressed by the recovery of damages for the wrong

⁴ A case decided after this court's jurisdiction order, *Transkentucky Transportation Railroad v. Louisville and Nashville R.R. Co.*, 1983-2 Trade Cases, ¶ 65,476 (E.D. Ky. 1983), supports this court's decision on the issue of exclusive jurisdiction. In that case, plaintiffs (referred to as TTI) were corporations engaged in the business of transporting coal from central

(footnote continues)

[of unlawful discrimination] . . . explicitly denounced" in the Interstate Commerce Act. Specifically, Pinney alleges that the

(footnote continued)

Kentucky to the Ohio River. Plaintiffs sued several railroads, alleging that defendants sought to monopolize the transportation of Kentucky coal in violation of the antitrust laws. Plaintiffs alleged that defendants violated the Sherman Act

by refusing to set rates for some shippers attempting to use the TTI project; by establishing rates and charges designed to discriminate against TTI and to exclude it from the marketplace; by refusing to provide access to TTI's proposed terminal site at Charleston Bottoms; and by instituting sham proceedings before the KRC [Kentucky Railroad Commission], ICC and Kentucky courts designed to harass and impede plaintiffs.

Defendants in Transkentucky attempted to characterize plaintiff's antitrust claims as an attack on the level of defendants' rates; defendants argued that since rates are actively regulated by the ICC and KRC, and are within the exclusive jurisdiction of those agencies, the court must dismiss those claims.

The court rejected defendants' arguments on implied immunity and found that neither the ICC nor KRC approved the rates in question. With respect to defendants' arguments on exclusive jurisdiction, the court reasoned:

[T]he regulatory and antitrust regimes are not in conflict in this case because this action is not a challenge to the level of defendants' rates and charges, as defendants contend. Defendants misconstrue the very nature of plaintiffs' complaint in an effort to place its allegations squarely within the exclusive jurisdiction of the ICC and KRC. Plaintiffs do not ask the court simply to find specific rates to be unreasonably high and to lower them retroactively to reasonable levels. *Cf. Keogh v. Chicago & Northwestern Ry. Co., supra*. Instead, plaintiffs seek to establish that defendants engaged in a broad pattern of conduct, including but not limited to the manipulation of rates, specifically designed to destroy the TTI project as a competitor. Damages would be measured not by the difference between the existing rates and some hypothetical rate, but by the business losses plaintiffs have sustained. Plaintiffs' complaint does not put in issue the lawfulness of defendants' rates and charges under the Interstate Commerce Act.

Id. at 68.306. Continuing, the court concluded:

These claims under the Sherman Act do not fall within the jurisdiction, exclusive or otherwise, of the ICC and KRC. Although the ICC does consider antitrust principles in determining the reasonableness of rates, the agency lacks authority to

(footnote continues)

defendants conspired to eliminate it as a competitor in order to monopolize the business of providing dock services for the unloading of ex-lake iron ore.⁵

(footnote continued)

enforce the antitrust laws or even to determine if they have been violated. See e.g., *McLean Trucking Co. v. United States* [1944-1945 Trade Cases ¶ 57,203], 321 U.S. 67, 79 (1944). . . .

Id. (further citations omitted).

N&W argues that the court in *Transkentucky* found controlling the fact that defendants' alleged actions occurred after the Staggers Act. This court does not agree. Although the *Transkentucky* court discussed the Staggers Act, it did not rely on this Act in making its ruling on the exclusive jurisdiction arguments. Indeed, it is not clear whether all of the actions underlying the alleged antitrust violations occurred before or after the 1980 enactment of the Staggers Act.

⁵ In a footnote, B&LE observes that "allegations of predatory railroad rate activity which might otherwise implicate the antitrust laws are part and parcel of the ICC's exclusive regulatory jurisdiction." Among the cases cited in support are three-judge district court decisions which set aside ICC orders involving "intermodal competition." However, in none of these cases is it understood that the ICC sought to adjudicate an antitrust claim brought by one mode of transportation against another mode of transportation, let alone an antitrust conspiracy charge. The closest to that type of situation is elucidated in *Lake Carriers Ass'n v. United States*, 399 F. Supp. 386, 391-92 (N.D. Ohio 1975). In *Lake Carriers* the court declared:

Here, the railroads have employed their monopoly powers to eliminate any effective competition by Lake Carriers which want to utilize unit-train service. If this dispute arose outside the strictures of the Interstate Commerce Act, the actions of the railroads might well amount to violations of the anti-trust laws. . . . If the railroads secured and maintained the business of Consumers Power Company and Detroit Edison Company on the basis of better service or lower lawful rates alone, the Lake Carriers could not legally complain. But here, the railroads' refusal to provide some type of unit-train service to the Lake Erie ports, with appropriate rates, constitutes an unfair competitive practice. In the Court's opinion, such a restriction upon competition is clearly contrary to the public interest.

This court does not equate the railroads' refusal to provide the Lake Carriers with some type of unit-train service to the Lake Erie ports (found by the court to be "an unfair competitive practice") with the presently alleged "conspiracy to eliminate a competitor and monopolize an industry."

II.

In *Keogh v. C&N W. Ry. Co.*, 260 U.S. 156 (1922), plaintiff, a manufacturer and interstate shipper of its products, sought damages against eight railroad companies and 12 individuals under the Sherman Act. Plaintiff Keogh sued for damages to the extent of the difference in rates between certain uniform freight rates and "those which would have been paid under rates prevailing before September 1, 1912, and which, but for the conspiracy, would have remained in effect." Keogh held that private shippers may not recover damages under section 7 of the 1890 Antitrust Act because they lost the benefit of rates which could have been lower but for the conspiracy. The shippers were limited to the remedy for damages provided under sections 8 and 9 of the Interstate Commerce Act. The Court stated that

the legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163. The Court explained:

This stringent rule prevails because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.

Id.

Stressing shipper remedies against carriers, these principal reasons for the *Keogh* holding, considered anew, make *Keogh* inapplicable to plaintiff's claims. As held before, "it cannot be said that plaintiff will unfairly benefit in its status as a competitor of the railroads if it is permitted to recover damages

resulting from a conspiracy by those very same competitors to drive it out of business and monopolize the industry.⁶

As an additional reason for its holding, *Keogh* states:

The character of the issues involved raises another obstacle to the maintenance of the action. The burden resting upon the plaintiff would not be satisfied by proving that some carrier would, but for the illegal conspiracy, have maintained a rate lower than that published. It would be necessary for the plaintiff to prove, also, that the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce.

⁶ Claiming that *Keogh* applies to railroad competitors "for business allegedly lost as a result of anti-competitive railroad ratemaking," B&LE in its reconsideration brief discusses two cases cited by *Keogh* and "not addressed by this Court." Citing *Louisville & Nashville R. R. Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916), *Keogh* states, "If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained whatever their nature would have been recoverable in such proceedings." *Ohio Valley Tie Co.* was a state damage action brought under the Interstate Commerce Act. It was not an antitrust action. Ohio Valley Tie, pursuant to section 9 of the Interstate Commerce Act, previously obtained an order of "reparation for unreasonable rates" and an order which established a reasonable future rate. The Court held that this award precluded additional compensation in the state court action for "keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business." While plaintiff did allege that the railroad's quoted rates "were done for the purpose of getting rid of the plaintiff as a competitive buyer," *id.* at 289, this fact is not material in *Keogh's* reference to *Ohio Valley Tie*.

The second case, *Meeker v. Lehigh Valley R.R. Co.*, 162 F. 354 (S.D.N.Y. 1908), held "that a resort to the Interstate Commerce Commission is a condition precedent to the maintenance of an action in the Circuit Court of the United States to recover damages solely occasioned by the payment of excessive, unjust, or unreasonable rates for the transportation of interstate commerce, even when the exaction of such excessive rates was the result of a combination or conspiracy made unlawful by the 'Sherman antitrust law' . . ." A demurrer was sustained, because while the plaintiff alleged that the rates were excessive and unreasonable, it did not allege that "the rates charged and exacted have been declared excessive or unreasonable or unjust by the Interstate Commerce Commission." Primary jurisdiction, the critical basis of the *Meeker* ruling, is dealt with in part IV of this opinion.

Id. at 163, 164. Relying on this reasoning, N&W contends:

Pinney alleges damages based on business lost as a result of Conrail's rates for line haul transportation from Pinney Dock, and as a result of the handling charges in effect at various railroad docks on self-unloading vessels. Since the Interstate Commerce Commission had exclusive jurisdiction over all those rates during the entire period of alleged conspiracy, Pinney cannot logically meet its burden of proof before this court. (N&W Reconsideration Brief, p. 26.)

At other points in its reconsideration brief, N&W makes the same argument. Thus, it states at p. 27 that this court in order to award damages "must not only determine that the rates in effect were illegal under the Interstate Commerce Act, but it must further find under the Act the line haul rates to which Pinney was entitled and the proper level of handling charges applicable to self-unloaders at railroad docks throughout the alleged period of conspiracy." It insists that "[t]hose findings are the necessary factual predicate to ascertain the amount of business allegedly lost by Pinney due to the conspiracy, yet these are [matters entrusted by Congress to the exclusive jurisdiction of the ICC pursuant to the Interstate Commerce Act]."

In its opposition brief, Pinney counters:

N&W's basic premise is wrong. Pinney does not ask this Court to find any railroad tariff unreasonable or to lower the tariffs retroactively or prospectively. Instead, as this Court previously found, Pinney seeks to recover damages it suffered as a direct competitor of defendants. Slip op. at 46, 53-54.

As recently stated by the Supreme Court in *Burlington Northern, Inc. v. United States*—U.S. 74 L. Ed. 2d 311, 319 (1982), "[A] federal court has no jurisdiction to enter an order that operates to fix rates." Hence, it is plain that this court lacks the authority to rule at or before trial on the reasonableness of the applicable line-haul commodity rate, the class rate, or the

dock handling charges posted in the tariffs of affected carriers that pertain to Ashtabula Harbor during the relevant period.

As seen, plaintiff states that it "does not ask this Court to find any railroad tariff unreasonable or to lower the tariffs retroactively or prospectively." However, as N&W notes, plaintiff does not deny that its proof of damages will involve this court in a determination, *inter alia*, that "certain tariff rates applicable to line haul from Pinney Dock and to the handling of iron ore vessels at railroad docks would, in the absence of alleged conspiracy, have been at levels different than their actual levels during the relevant period."

Because the reasoning of *Keogh*, 260 U.S. at 163-64, is deemed to govern the plaintiff's burden of proving damages, it is evident that it is essential to ascertain before trial whether the court will be asked to determine at trial that, but for the alleged illegal conspiracy, the defendant carriers would have published: (1) a line-haul rate for iron ore shipped from Pinney Dock that would have been lower than the class rate, but higher than the existing line-haul rate, and whether that hypothetical line-haul rate would have conformed to the requirements of the Interstate Commerce Act; (2) handling charges for self-unloaders unloading at Pinney Dock lower than the published handling charges for bulkers and whether that hypothetical lower rate would have conformed to the requirements of the Interstate Commerce Act.

The Court recognizes that *Keogh* declares that "by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination." Although the question has not been previously addressed by the parties, it would appear that if the plaintiff intends to prove damages by establishing a hypothetical line-haul rate or hypothetical handling charges the court would lack the authority to ascertain such hypothetical rates and would not be able to refer the question to the Commission for determination. Since dismissal of the plaintiff's claim would then appear to be the only alternative, the earliest resolution of the issue is important to all parties. Hence, the court directs the plaintiff

within 30 days of the date of this memorandum and order to file a written statement declaring whether or not the plaintiff, in proving damages, intends to ask the court to make any of the foregoing or similar determinations.⁷

III.

Defendants N&W and B&LE separately move for the court's reconsideration of its ruling that the conspiracy alleged in the instant case is expressly immunized under the antitrust laws. In its June 21, 1983 memorandum and order, this court concluded its analysis of the express immunity issue as follows:

Having examined the actual language of the Interstate Commerce Act, the pertinent legislative history, and the relevant case law, the court concludes that it should apply an analysis similar to that employed in *Aircoach* and its progeny. Since a conspiracy to eliminate a competitor cannot fall within 49 U.S.C. § 5(b)(9)'s limited grant of express antitrust immunity, plaintiff is entitled to prove its allegations that the defendants conspired to eliminate it as a competitor in order to monopolize the business of providing dock services for the unloading of ex-lake iron ore.

Jur. Op. at 43.

Both N&W and B&LE argue that section 5a of the Interstate Commerce Act, 49 U.S.C. § 5(b)(9), expressly immunizes the collective actions at issue in this case since these actions were taken in accordance with an approved rate bureau agreement. Further, they both argue that neither the legislative history nor the cases relied on by this court support the creation of a predatory intent exception to section 5a immunity. With respect to the court's reliance on *Atchison, Topeka & Santa Fe*

⁷ The order is entered pursuant to Fed. R. Civ. P. 16, and its general supervisory powers over its docket, to define and narrow the issues and to ready the case for trial.

Railway v. Aircoach Transportation Association, 253 F.2d 877 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960), these defendants' arguments differ. In its reply brief, N&W argues that *Aircoach* is wrong and should not be followed. B&LE, on the other hand, argues that *Aircoach* should be read narrowly so that it does not apply to cases such as this where there was fully regulated ratemaking under the ICC's exclusive control.

Both N&W and B&LE basically reiterate arguments made in their original motions. This court rejected these arguments in its ruling which followed *Aircoach* and its progeny, and which declined to read *Aircoach* as narrowly as urged by B&LE. Since this court's ruling, the D.C. Circuit decided an appeal in the criminal antitrust case arising out of the same facts as the instant one. *United States v. Bessemer and Lake Erie Railroad Company*, 717 F.2d 593 (D.C. Cir. 1983) (hereinafter *Bessemer and Lake Erie*). In that criminal case, B&LE was convicted pursuant to a plea of *nolo contendere* of conspiring to inhibit or eliminate competition in violation of the Sherman Antitrust Act. By its plea of *nolo contendere* and in appealing that conviction, B&LE admitted the truth of the factual allegations in the indictment.

The D.C. Circuit court concluded that B&LE could not "rely on the immunity granted by section 5a." B&LE argued that its actions were legal because they were in conformity with a section 5a rate agreement, and that immunity cannot be voided by anticompetitive intent. Addressing that argument, the court first emphasized the limited nature of section 5a immunity, noting that the legislative history supports a limited reading of section 5a's protections. *Id.* at 599-600. The court then quoted the same language from the House Report quoted by this court:

The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the [ICC] and approved by that body [H.R. Rep. No. 1100, 80th Cong. 1st Sess. 5 (1947).]

Id. at 600; Jur. Op. at 26.

The court in *Bessemer and Lake Erie* reviewed *Aircoach*, in which a group of railroads claimed that their practice of submitting joint bids for military transport business was immunized by section 5a "even though a desire to eliminate competition from airlines allegedly underlay the joint bid system." 717 F.2d at 600. The D.C. Circuit court noted that the court in *Aircoach* rejected their claim by stating:

Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of *Aircoach*, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9). We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purpose of eliminating the competition of *Aircoach* for the section 22 transportation involved.

Id. Responding to B&LE's argument that *Aircoach* does not apply to this case, but only to cases where the rates involved are not subject to ICC remedial jurisdiction, the court stated:

Even if we were to adopt appellant's limiting reading of *Aircoach*, the appellant's argument would not succeed on the facts of this case. The offense charged in this case is not subject to ICC remedial jurisdiction. The government does not seek to amend the 5a rate agreement or to alter prospectively the rates set by the 5a rate bureau; it seeks to punish an illegal antitrust combination which happened to employ a rate bureau. The ICC is not equipped to "remedy" criminal violations of the antitrust laws.

Id. The court continued:

The statutory language, the legislative history, and the case law all point to the same conclusion: the

section 5a immunity reaches only those actions actually taken "in conformity with" the rate agreement and the terms and conditions laid down by the ICC. It does not sweep within it a larger conspiracy which utilizes a section 5a rate bureau as a means to an end; it does not legitimize illegal schemes which happen to coincide at points with the legitimate actions of a rate bureau.

Id.

Applying this law to the facts, the court in *Bessemer and Lake Erie* first pointed out that the indictment did not "attack the rate bureau itself," but alleged that some members of the rate bureau entered into a separate agreement which only incidentally touched the setting of rates. Next, the court noted that this separate conspiracy was distinguished from the rate bureau by more than mere purpose or "intent;" several of the actions taken by this conspiracy "were not 'in conformity with' the rate bureau's 5a rate agreement." *Id.* at 601.

One of the procedurally inconsistent actions alleged was defendants' quotation of the same dock handling charges for self-unloaders and bulkers, even though the services were not to be performed. The court stated:

The crux of this charge is that handling the self-unloaders represented a significantly different type of service. Rather than promulgating a new rate for this new service in accordance with ICC requirements, the conspirators shielded the new joint rate from ICC scrutiny.

Id. One of the "substantively inconsistent" acts alleged was defendants' refusal to lease railroad dock space to Litton for handling iron ore from the self-unloaders. According to the court, "[s]uch an agreement purports to regulate a subject matter—services available to customers—not within the scope of a section 5a agreement." *Id.* Finally as one of the alleged acts that had nothing to do with the section 5a rate agreement, the court pointed to the allegation that the conspirators sought to eliminate the trucking of iron ore from a private dock.

The instant case closely parallels its criminal analogue and, concomitantly, a parallel analysis can be made. Like the indictment, Pinney's first amended complaint does not "attack the rate bureau itself." Indeed, not mentioning the rate bureau, it alleges a separate conspiracy to eliminate Pinney as a competitor. Additionally, this separate conspiracy can also be distinguished by more than mere "intent," for several of the actions allegedly taken by the conspiracy were not "in conformity with" the 5a rate agreement.

In its first amended complaint, among other things, Pinney alleges that defendants, "[d]eliberately and purposefully foreclos[ed] Pinney Dock's development as an iron ore handling facility by deliberately and intentionally preventing and postponing the construction and use of the self-unloading vessels which Pinney Dock was designed to serve." This was accomplished by: "(1) the refusal to handle self-unloading vessels at docks owned or operated by defendants and their coconspirators; and (2) the imposition of artificial, arbitrary and unjustifiable dock handling charges on iron ore discharged from self-unloading vessels. . . ." Taken together, these allegations cover the same subject matter and would permit trial proof (in the present record), as alleged in the indictment, that "in furtherance of the aforesaid combination and conspiracy the defendants and unindicted co-conspirators . . . quot[ed] the same charges for handling iron ore from self-unloaders as from bulkers even though services identified in the applicable tariffs were not performed." As previously noted, the D.C. Circuit found:

The crux of this charge is that handling the self-unloaders represented a significantly different type of service. Rather than promulgating a new rate for this new service in accordance with ICC requirements, the conspirators shielded the new joint rate from ICC scrutiny.

The allegations of plaintiff's complaint and the proof in the present record represent a similar claim by the plaintiff of non-conformity with section 5a requirements.

Pinney's complaint also alleges actions which are substantively inconsistent with the section 5a rate agreement. As noted above, in *Bessemer and Lake Erie* the court found the allegations pertaining to defendants' refusal to lease dock space to Litton to be substantively inconsistent because that action purported to regulate services available to customers, a subject matter not within the 5a agreement. Pinney does not and could not charge that a refusal to deal with Litton was an act that would cause injury to Pinney. Yet, in proving its conspiracy charge against the defendants, it would be relevant for Pinney to offer evidence that the defendants refused to lease railroad dock space to Litton Industries for the handling of iron ore from self-unloaders. The D.C. Circuit refused to accept B&LE's argument that "the refusal to lease dock space was merely 'ancillary' to the rate structure" and therefore found this act of refusal was inconsistent with the substantive requirement of section 5a that "joint agreements be limited to rates."

The D.C. Circuit also rejected the argument that "the scheme to terminate the competitive trucking service in fact turned on ratemaking—a member of the conspiracy offered to haul iron ore from the private dock at a lower rate if the truckers were denied access." 717 F.2d at 602. The court held that "[t]he immunity granted by 5a does not extend to bald attempts to use the rate-setting process to blackball competitors." *Id.* In its jurisdiction opinion, this court similarly noted that "plaintiff may also attempt to prove its allegation that defendants conspiratorially harassed it in its attempts to truck iron ore from its dock, subject to the limitations imposed by *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 1271 (1961)." Jur. Op. at 62-63.

In sum, this court agrees with the holding of the D.C. Circuit that section 5a immunity reaches only these actions taken "in conformity with" the rate agreement. As stated by the court in *B&LE*, section 5a immunity "does not legitimize illegal schemes which happen to coincide at points with the legitimate actions of a rate bureau." Similarly, as stated by this court in its jurisdiction order, a section 5a agreement cannot

serve to immunize an alleged "later 'agreement' to eliminate a competitor and monopolize a market."⁸

IV.

Turning to another aspect of jurisdiction, N&W and B&LE, relying on the doctrine of primary jurisdiction, ask the court to refer the case to the Interstate Commerce Commission. Since this court entered its jurisdiction opinion on June 21, 1983, the doctrine of primary jurisdiction was determined to be inapplicable in the criminal analogue of the present case, *supra*. The court of appeals affirmed defendant B&LE's entry of a plea of *nolo contendere* to the indictment, which charged the appellant and other rail carriers under the Sherman Antitrust Act with conspiring to inhibit or eliminate competition. As *amicus*, N&W urged referral "so that the ICC can examine the issues of intent, compliance with 5a procedures, and the scope of 5a immunity." The court declined to do so. It declared:

Put simply, the time for urging the doctrine of primary jurisdiction has passed in this case. As we have discussed, the entry of the *nolo* plea bars all issues but those involving subject matter jurisdiction and the legal sufficiency of the indictment. Primary jurisdiction is not such an issue.

⁸ Defendant N&W attributes to the court the misconception that section 5a immunity provisions were inapplicable to defendants' actions "because the particular rate bureau proceedings in which such action was taken were not submitted to the ICC for its approval." B&LE makes a similar argument. Respectfully, this does not reflect this court's understanding of section 5a immunity provisions. It is recognized that the parties to a carrier agreement, approved by the ICC pursuant to 49 U.S.C. § 5(b)(2) are, pursuant to § 5(b)(9), "relieved from the operation of the antitrust laws . . . with respect to the carrying out of such in conformity with its provisions . . ." If "conformity with [section 5a's] provisions" occurred, then immunity attaches to the joint action. But immunity does not attach if conformity was lacking either as to procedural or substantive requirements of section 5a. The point sought to be made in the court's jurisdiction opinion (as quoted from page 14), is that ICC approval of the Eastern Railroad § 5a Agreement cannot serve to immunize the alleged "later 'agreement' to eliminate a competitor and monopolize a market." Such an agreement, as alleged, surely could not be in conformity with section 5a's substantive ratemaking provisions.

Elucidating, the court stated:

The doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts. . . . We may not now second guess whether the trial judge used his discretion wisely.

In this civil case, still at the trial court level, the doctrine of primary jurisdiction remains a timely issue. Although the motion of the defendants for reference of the case to the ICC was overruled in the jurisdiction opinion, the applicability of the doctrine of primary jurisdiction will be reconsidered.

In *United States v. Western Pac. R. Co.*, 352 U.S. 59 (1956), the Court reviewed a court of claims summary judgment in favor of three railroads in a Tucker Act suit against the United States. The court of claims held that the shipments in question were "incendiary bombs" under the meaning of the applicable tariff. Therefore, the railroads were entitled to the higher first class rate. In reversing the judgment and remanding the case, the Court concluded that "in the circumstances here presented the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission." *Id.* at 63.

Determining when the "doctrine of primary jurisdiction" should be applied in effectuating the purposes of the Interstate Commerce Act, the Court said it "depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act."⁹ *Id.*

⁹ The Court harked back to *Texas & Pacific R. Co. v. American Tie & Timber Co.*, 234 U.S. 138 (1914) ("the courts must not only refrain from making tariffs, but, under certain circumstances, must decline to construe them as well . . ."); and *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922). If "the question is simply one of construction, the courts may pass on it as an issue 'solely of law.'" However,

where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their

(footnote continues)

Guided by these principles prescribed for determining when questions should be referred to the Interstate Commerce Commission,¹⁰ the court will separately consider two questions urged for reference.

A.

The court first considers whether this court should refer to the ICC the issue of the intent and effect of defendants' rate actions. In its motion for reconsideration, N&W noted that this court followed *Atcheson, Topeka & Santa Fe Ry. Co. v. Aircoach Transport Association*, 253 F.2d 877 (D.C. Cir. 1958). Based on this, N&W contends:

If the *Air Coach* approach is adopted, section 5a applies to protect each defendant from liability based on its participation in rate bureau communications unless it is found to have engaged in such activities with the specific intent to eliminate the plaintiff as a competitor. Thus, the dominant issue to be decided at trial is the intent of the defendants in engaging in such activities. [Footnote omitted.]

In support of its argument for referral, N&W cites *Atlantic Coast Line Ry. Co. v. Riss & Co.*, 267 F.2d 657, 658-69.

(footnote continued)

meaning or proper application, so that "the enquiry is essentially one of fact and of discretion in technical matters." then the issue of a tariff application must first go to the Commission.

Id. at 65.

Relying on *United States v. Western Pac. R. Co.*, the Court held in *ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-80, that "a shipper who commences his section 9 reparation proceeding in the District Court will nevertheless be required to repair to the Commission for decisions of issues, like the reasonableness of rates, which call the primary jurisdiction doctrine into play."

¹⁰ The "referral" procedure is explicated in *Nader v. Allegheny Airlines*, 426 U.S. 290, 307, as that of the court staying the case "pending reference to the Board."

Similarly, B&LE takes issue with this court's refusal to refer any issue with respect to defendants' intent to the ICC, arguing that "such referral is mandated under the *Aircoach* doctrine (as modified by the court of appeals in *Riss, supra*), upon which the court otherwise relied."¹¹ B&LE then proceeds with a lengthy survey of what it deems to be the relevant regulatory law. Based on this, B&LE submits

that the alleged restrictive linehaul tariffs as well as defendant's alleged maintenance of a uniform handling charge structure—and defendants' alleged intent in doing so—would indeed very likely have been held lawful under the Interstate Commerce Act, notwithstanding that they may not have conformed to the competitive norm of the antitrust laws.

B&LE's latter argument ignores the critical language in *Aircoach*, quoted in this court's jurisdiction order at 28-29:

Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition, of *Aircoach* rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9). We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purpose of eliminating the competition of *Aircoach* from the section 22 transportation involved.

Aircoach, supra, at 887. Thus, even if B&LE were correct in stating that defendants' activities with respect to the alleged restrictive line-haul tariffs and handling charges would probably have been found to be lawful under the ICA, under *Aircoach* these actions may still be subject to antitrust liability if part of a conspiracy to eliminate Pinney as a competitor.

¹¹ In its memorandum in support of its "summary judgment or, alternatively, referral motion," B&LE, as the first question for requested referral to the ICC, stated: 1. whether defendants' rate actions were motivated by predatory intent or by other consideration such as carrying out obligations under the Interstate Commerce Act.

The defendants are correct in arguing that the D.C. Circuit modified *Aircoach* in *Riss*, *supra*, but this court respectfully disagrees with their contention that this modification mandates referral of the intent issue to the ICC. In *Riss*, the court of appeals held that *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), modified *Aircoach* by imposing the following requirement:

[T]he issue of the intent and effect of an agreement approved by the Commission must, in a case where such issue is the sole or dominant issue in the case, first be referred to the Commission prior to a court determination of whether such agreement violates the anti-trust laws. . . .

Riss, *supra*, at 658. However, the *Riss* court also held that *Isbrandtsen*

does not necessarily require referral to the Commission of issues . . . where the agreement is only one of a considerable number of overt acts alleged and where the policy favoring referral is clearly outweighed by other factors such as the probability of undue delay and the overriding importance of early consideration of the other overt acts alleged. . . .

Id. The court of appeals remanded the case to the district court with directions to vacate its previous order and reconsider petitioner's motion for reference in light of *Isbrandtsen*.

In *Isbrandtsen*, the Federal Maritime Board approved a dual rate system proposed by a shipping conference. The Court of Appeals set aside the Board's order, and the Supreme Court affirmed. The Court held that since the Board found that the dual-rate contract was a necessary competitive measure required to meet the competition, this contract was a resort to discriminating or unfair methods in violation of the Shipping Act. After analyzing the applicability of *Cunard*, *supra*, and *Far East Conference v. United States*, 342 U.S. 570 (1952), the Court concluded:

It is, therefore, very clear that these cases, while holding that the Board had primary jurisdiction to

hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack. Rather, those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed. Compare *Denver Union Stock Yard Co. v. Producers Livestock Marketing Assn.*, ante, p. 282. It is recognized that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern. Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation.

356 U.S. at 498.

After *Riss* was remanded to the district court, Judge Sirica carefully analyzed the effect of *Isbrandtsen* on *Aircoach*. Upon reviewing the *Isbrandtsen* decision, Judge Sirica noted: "it is clear that the problem of whether or not a district court should refer certain issues to an administrative agency was not squarely before the court in the *Isbrandtsen* case." 170 F. Supp. 354, 365. The court then proceeded by first pointing out that *Aircoach* contained two basic holdings:

The first related to the proper forum for decision of issues as to the procedural agreements and their connection with Section 22 rate practices. The second dealt with the exceptional circumstances under which Sec. 5a immunity would not apply. On the first issue, the Court of Appeals held in the ACTA case that the I.C.C. and the District Court had concurrent jurisdiction to decide the intent and effect of approved procedural agreements in relation to Section 22 rates, and whether coverage by these

agreements would immunize these rates from the antitrust laws.

Id. at 364. According to Judge Sirica, the court of appeals in *Riss* interpreted *Isbrandtsen* as modifying only the first holding of *Aircoach*. The district court concluded:

It is the governing rule now that the issue of the intent and effect of a rate reduction, claimed to have been taken pursuant to procedures set forth in *agreements approved by the Commission* under Section 5a of the Interstate Commerce Act, must, *in a case where such issue is the sole or dominant issue*, first be referred to the Commission prior to a Court determination of whether such rate reduction violates the antitrust laws.

Thus, it would appear that the second holding of ACTA [*Aircoach*] stands unaffected by *Isbrandtsen*.

Id.

Applying those legal principles to the case, Judge Sirica found that

it is also clear that the intent and effect of the Section 22 rate reduction is in no sense the dominant, much less the sole, issue of this litigation. The complaint as supplemented alleges a complex conspiracy in violation of the Sherman Act. A concerted reduction in . . . [rate] is alleged to have been one of the many overt acts designed to effectuate unlawful plan.

Id. at 366. Based on the finding that the rate reduction issue was not the sole or dominant one, the court held that "no possible ruling as to its coverage by prior approved procedural arrangements would be conclusive for such rate reduction as alleged to be part of a conspiracy to restrain trade." *Id.* at 368. Continuing by considering the practical aspects of referral, Judge Sirica concluded that it would "be contrary to sound judicial discretion to permit [the projected] additional delay to this overpostponed litigation merely to seek an optional ruling

from the Commission on the rate reduction aspect which is not the sole or dominant issue in this case"¹² *Id.*

Similarly, here, the plaintiff will seek to present a considerable body of evidence in documents, depositions, and in live testimony to show (1) the existence of a conspiracy to monopolize "the business of providing dock services for iron ore and other goods moving over docks on the lower Great Lakes;" (2) that each of the charged defendant railroads willfully became a member of the conspiracy; (3) that one or more overt acts occurred and that one or more of said overt acts were performed to accomplish the object or purpose of the conspiracy; (4) that the particular defendant under consideration acted with a specific intent to eliminate Pinney as a competitor to monopolize the business of providing dock services for the unloading of ex-lake iron ore; and (5) that as a direct and proximate result of said conspiracy, Pinney suffered injury and damage to its business or property. Since the fourth element, *i.e.*, specific intent, is only one of the elements which the plaintiff must prove, it cannot be said or determined that the intent element is either "the sole or dominant issue."¹³

The court further concludes that it would not be practical to refer to the Commission to consider only the proof, isolated from the total body of plaintiff's evidence, that relates to the fourth element of specific intent. Hence, the court concludes, upon reconsideration, that the intent and effect issue should not be referred.

¹² Thereafter, petitioners were denied a writ of certiorari by the United States Court of Appeals. *Atlantic Coast Line Ry. Co. v. Riss & Co.*, 267 F.2d 659. The court concluded that it should not exercise its extraordinary jurisdiction under 28 U.S.C. § 1651, not being in the "best interest of sound judicial administration a review of this stage of the litigation the District Court's decision."

¹³ Thus, this court agrees with the statement, albeit *dicta*, of the District of Columbia Circuit in *Bessemer and Lake Erie*, *supra*, as expressed in n.43. "In any event, in the case before us the 'intent and effect' of the rate filings is only one issue among several."

B.

The second issue which might be referred to the Commission relates to whether defendants' actions were "in conformity with" the 5(a) agreement. In its opposition to reconsideration, Pinney argues:

[*Atlantic Coast Line Railroad v. Riss & Co.*] makes plain that referral is appropriate only where the "sole or dominant" issue is whether an otherwise properly executed rate action is unlawful because of wrongful intent. In this case, the rates set by defendants were never approvable by the ICC because defendants did not comply with the 5a agreement.

Id. at 17. N&W deems this language "an apparent reference to the charges made by Pinney earlier in the case that the railroads' alleged activities were not immune regardless of intent because they were not in compliance with the procedures specified in the Eastern Railroads 5a agreement." N&W said that this "continuing dispute concerning the defendants' compliance with section 5a procedural requirements serves to heighten the need for referral in this case." N&W then urges that

[t]he ICC is the only forum qualified to decide issues arising under the technical language of the Eastern Railroads Section 5a Agreement because it approved the very language at issue and exercised continuing supervision over the rate bureau's operations.

N&W and B&LE, in an earlier submission, rely on *Luckenbach Steamship Company, Inc. v. United States*, 179 F. Supp. 605 (D. Del. 1959), *aff'd per curiam* as to the antitrust issue, 364 U.S. 280 (1960), and *Canned Goods From Pacific Coast to Eastern Points*, 315 I.C.C. 769, 790-92 (hereafter *Canned Goods*). Luckenbach, a general cargo carrier in the intercoastal trade, and others, filed a complaint with the ICC in which they protested the railroads' proposed tariff schedules to establish reduced commodity rates on canned goods from the Pacific coast to destinations in different areas of the country. While the Commission ordered an investigation, it denied

Luckenbach's request to suspend the new rates. Charging there was a violation of the "National Transportation Policy and the Sherman Anti-trust Act," Luckenbach sought a district court injunction against the United States and certain railroads to order the Commission to suspend the proposed rates. 179 F. Supp. at 607. Luckenbach alleged that the reduction in rates was "designed (1) to monopolize the transportation of canned goods from Pacific coast origins to Atlantic coast destinations; and (2) to drive Luckenbach from the business." *Id.*

The three-judge statutory court denied the requested injunction. The court held that the Commissioner's denial of a rate suspension is by law committed to agency discretion and, therefore, not reviewable. *Id.*

With reference to *Luckenbach's* charges that Sherman Act sections 1 and 2 were violated, the court noted that "the precise facts forming the basis of plaintiff's antitrust action are cognizable by the Commission [as] amply supported by plaintiff's showing before the Commission in the suspension proceeding." *Id.* at 611. The plaintiff had filed with the Commission its "Protest and Petition for Suspension" in which the plaintiff set forth its claims under the heading "Violation of the Antitrust Laws." Having previously acknowledged the applicability of the doctrine of primary jurisdiction, the court invited the Commission "initially to rule on the instant [antitrust] claims." "Paramount" in its determination was the fact that defendant railroads were operating pursuant to section 5(a) antitrust exemption agreements. Recognizing that "[s]ection 5(a) supersedes the Sherman Act to the extent that the approved agreement is immunized from Sherman Act proscriptions," the court held that "since Section 5(a) is administered by the Commission, it is incumbent upon the court to seek the observations of the Commission with respect to the extent and scope of the exemption." *Id.* at 613. In exercising its discretion in fixing the breadth of this reference to the Commission, as seen, the court considered the factor that all of the claimed

antitrust violations were already presented to the Commission.¹⁴

The Supreme Court's *per curiam* affirmance of the antitrust phase of the three-judge statutory court judgment was without opinion. Thus it was a summary affirmance. The Supreme Court has made clear that "the precedential effect of a summary affirmance can extend no farther than 'the precise issues presented and necessarily decided by those actions.'" *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182 (1979), quoting from *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Hence, the *per curiam* summary affirmance upheld the district court's decision to seek an initial ruling. However, in the absence of an opinion, the affirmance may not be read as requiring a Commission reference each time antitrust claims are made against carriers subject to section 5a immunity. Nor may it be read as fixing the scope of referral to the Commission, pursuant to the doctrine of primary jurisdiction, as ordered in *Luckenbach*.¹⁵

After the *Luckenbach* court dismissed the action, *Luckenbach* pursued its complaint before the ICC. The ICC's subsequent report, *Canned Goods From Pacific Coast to Eastern*

¹⁴ Rather than retain jurisdiction of the antitrust charges, the three-judge court dismissed the action. It followed *Far East Conference v. United States*, 342 U.S. 570, 577 (1952), which held that no purpose would be served by holding the district court case in abeyance while the "proceeding before the [Federal Maritime] Board and subsequent judicial review or enforcement to its order" was being pursued. *Luckenbach's* dismissal of the action is not a holding that the ICC had exclusive jurisdiction, since *Far East Conference* added that "a similar suit is easily initiated later, if appropriate."

¹⁵ As indicated in part IV.(A), *Riss* limited the reference to "the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b" but made it mandatory "in a case where such issue is the sole or dominant issue." Because the D.C. Circuit in *Riss* in reaching its conclusions recognized that a reference under the doctrine of primary jurisdiction has discretionary aspects, 267 F.2d at 658, and *Luckenbach's* reference, in terms of its scope, was likewise discretionary, this court finds no conflict between the holdings in *Riss* and *Luckenbach*.

Points, supra, is instructive in considering the claim of defendants N&W and B&LE that section 5a matters involving the Eastern Railroads Agreement should be referred to the Commission. The Commission entered its report on March 19, 1962, taking up exceptions to the examiner's report issued after a hearing.

The Commission first took up the protestants' (Luckenbach's and others') contention that "in making the new rate the respondents violated the antitrust laws in acting outside of their joint ratemaking agreements approved by [the Commission]." The Commission found that "[a]ll of the activities upon which [Luckenbach's] claims were based were preliminary to the consideration and consummation of the adjustment finally approved, including the new rate, by the duly constituted bodies specified in the agreements;" and that the activities' "purpose was to obtain information necessary to thorough and intelligent consideration of the subject matters."

The Commission noted that "the exchange of correspondence and information by individual railroads" was "expressly provided for in the agreement." The protestants urged that the Special Canned Goods Committee was "an organization not provided for in the agreement," and "did not keep regular records of its proceedings." However, the Commission found that paragraph (c) of the agreement authorized the designation of "subcommittees" or "special committees" which were "to investigate any traffic matter before the organization and to make reports thereon." The Commission found that the committee referred to by the protestants "was one of several such subcommittees," that "its function [in reporting to the TEA] was "solely advisory," and that the agreement did "not require that such a committee hold hearings or keep minutes of its informal conferences with shippers." The Commission concluded:

The respondents, in making the new rate, employed procedures which are normally used in processing similar rate proposals, and which complied fully with their applicable section 5a agreements. Con-

sequently, their action was immune from the antitrust laws, at least with respect to its collective or concerted nature.

315 I.C.C. at 792.

The Commission then considered whether the new rate constituted destructive competition and whether the proposed reduction was designed to eliminate *Luckenbach* as a competitor. After reviewing all relevant facts and circumstances, the Commission concluded:

[N]o reasonable inference can be drawn that factors other than the normal incidents of fair competition were present, or that the respondents, by means of that rate, intended to destroy Luckenbach as a competitor.

Id. at 795.

Comparing one aspect of the present case against the analysis of *Canned Goods*, it is concluded that the Commission's special expertise is not needed to examine and make findings of what occurred at the numerous "informal" meetings of members of the CCIOC as reported in the several unpublished sets of minutes. In *Canned Goods*, the Commission's expertise was not needed to determine that "informal nonpublic meetings with shippers" held by the "Special Canned Goods Committee" had occurred. Rather, the Commission's expertise assisted in making a determination that the 5a agreement provided for this type of sub-committee and that "the agreement [did] not require that such a committee hold hearings or keep minutes of its informal conference with shippers."

However, if plaintiff intends to claim that either the Eastern Railroad's 5a agreement or the Commission's procedures or practices in administering such agreements did not provide for or permit the joint discussions and actions or proceedings, then such a claim presents a question which should initially be referred to the Commission. For example, does the plaintiff intend to charge that lack of conformity with the section 5a Eastern Railroads Agreement involved failure to

give notice to affected parties, as in *Board of Trade of City of Chicago v. I.C.C.*, 646 F.2d 1187 (7th Cir. 1981)?¹⁶

The plaintiff is directed to indicate in writing within 30 days of the date of this memorandum and order what its intentions are with reference to this matter. If plaintiff intends to make such a claim, plaintiff should so indicate. Thereupon, this court will determine whether a reference to the Commission is appropriate. If so decided, the court would confer with counsel as to the content of the reference before the court issues an order of reference to the plaintiff. The case would then be suspended while the plaintiff petitions the ICC for a section 13 investigation and report of the question.

In *Canned Goods*, the Commission concluded that the railroads' procedures in making the new rate "was immune from the antitrust laws, at least with respect to [their] collective or concerted nature." Otherwise, the Commission did not attempt to analyze or adjudicate the several elements¹⁷ of *Luckenbach's* antitrust conspiracy charge. Nor could they have adjudicated the antitrust conspiracy charge. As expounded in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944):

[T]he Commission has no power to enforce the Sherman Act as such. It cannot decide definitively

¹⁶ *Board of Trade* involved an appeal from an ICC decision determining that certain tariff schedules filed by railroads were not unlawful under the Interstate Commerce Act. On review of the ICC decision by the district court, the court held

that the railroads violated 49 U.S.C. § 10706(a)(2) [formerly section 5a of the Interstate Commerce Act] by failing to follow the rate-getting procedures established in the *Agreement of the Eastern Railroads Under Section 5b of the Interstate Commerce Act*.

By its review and reversal, the court recognized that the courts have authority to adjudicate whether actions comply with prescribed 5a procedures.

¹⁷ Those elements would have included existence of a conspiracy to monopolize the affected business, membership of the defendants in such conspiracy, occurrence of one or more overt acts in furtherance of the conspiracy, predatory intent to destroy the business of Luckenbach, injury to the business or property of Luckenbach directly resulting from a conspiracy to violate the Sherman Act.

whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by the Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems.

Id. at 79. Since the Commission does not have the power to address and adjudicate plaintiff's antitrust claim, this court will not refer the entire claim to the ICC. Nevertheless, with respect to the issues itemized above, observance of the doctrine of primary jurisdiction, as explicated in *United States v. Western Pacific, supra*, and other cited cases, warrants reference of those issues in the event the plaintiff intends to make the identified claims.¹⁸

C.

N&W insists that "[t]he need for referral [to the ICC] is made all the more compelling in this case because the railroads are alleged to have acted with the intent to eliminate Pinney as a competitor in a market where all transportation was affected by the pervasive regulatory policies of that agency." As noted, the Transportation Act of 1920, adding section 15a to the Interstate Commerce Act, authorized the Commission to fix minimum rates. Previously the Commission could only prescribe maximum rates as it did in the *Iron Ore Rate* cases. Reviewing a number of cases, N&W contends that "[t]he

¹⁸ In part IV, the court has reviewed the doctrine of primary jurisdiction to the extent applicable. *American Commercial Barge Line Cl. v. Eastern Gas & Fuel Assn.*, 204 F. Supp. 451 (S.D. Ohio 1962), cited by N&W, applies the doctrine of primary jurisdiction. See also, *Hansen v. Norfolk & Western R.R. Co.*, 689 F.2d 707 (7th Cir. 1982).

However, as Pinney notes, *American Commercial Barge Line* appears to involve the application of 49 U.S.C. § 5(11), rather than 49 U.S.C. § 5b(9). *Brotherhood of Loc. 1 Eng. v. Chicago & Northwestern Ry. Co.*, 314 F.2d 424, 431 (8th Cir. 1963), indicates what the language plainly states that "§ 5(11) confer[s] exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." Hence, *American Commercial Barge Line* is not apposite, in any event.

ICC's administration of section 15a created a clear conflict between the goals of the Interstate Commerce Act and those of the antitrust laws, which had not existed prior to enactment of that statute."

B&LE reviews the same cases as well as some other ICC decisions. It mentions changes in ICC policies resulting from the addition of section 15a to the Act. Should this court on reconsideration adhere to its ruling regarding the *Keogh* doctrine and express section 5a immunity, B&LE asks this court to "avail itself of the expertise of the agency charged with administering the regulatory standards under which defendants operated before condemning defendants' challenged rate activity as unlawful under the antitrust laws."¹⁹ Following its survey of "relevant regulatory law," B&LE submits

that the alleged restrictive line haul tariffs as well as defendants' alleged maintenance of a uniform handling charge structure—and defendants' alleged intent in doing so—would indeed very likely have been held lawful under the Interstate Commerce Act, notwithstanding that they may not have conformed to the competitive norm of the antitrust laws.

B&LE and N&W's review of "relevant regulatory law" indicate that the Interstate Commerce Commission has repeatedly ruled in favor of railroad carriers where private docks have complained to the Commission that rail carriers engaged in discriminatory or unreasonable conduct in violation of the Interstate Commerce Act. But these cases do not present and have not dealt with issues arising under the antitrust laws.

Referring to the policies reflected in the decisions set forth by N&W in both its reconsideration brief and appendix, N&W asserts that the "ramifications of those policies continue to

¹⁹ The principal cases cited by the defendants are *Trunk-Line & Ex-Lake Iron Ore Rates*, 69 ICC 589 (1922); *Wharfage Charges at Atlantic and Gulf Ports*, 157 ICC 663 (1929); *U.S. Phosphoric Products Corporation v. Atlantic Coast Line Railroad Company*, 206 ICC 411; *Lake Coal Demurrage*, 232 ICC 735 (1939); and *United States v. Interstate Commerce Commission*, 352 U.S. 158 (1956).

affect the carriers' behavior throughout the period of alleged conspiracy." N&W concludes that "this court should not assume that the railroad's intent toward Pinney can be accurately ascertained without reference to the Commission's expertise in regulating the relevant market."

To the extent that B&LE and N&W may be asking this court to refer to the Commission for findings as to defendants' intent in connection with whether the defendants violated the Interstate Commerce Act by their alleged conduct, this court concludes that such issue should not be referred; such intent is not an issue in this case. The issues before this court do not directly involve whether or not defendants, by their alleged conduct, violated the Interstate Commerce Act.

However, if the defendants are asking that this court refer the issue of intent to violate the Interstate Commerce Act in connection with their request to refer the issue of predatory intent to eliminate Pinney as a competitor, the court has previously indicated its reasons for not referring the latter issue.

V.

B&LE moves for reconsideration of this court's ruling on Pinney's standing to raise certain claims. B&LE has not challenged Pinney's standing to complain of defendants' alleged actions restricting line haul rates on iron ore. Rather, B&LE in its original motion challenged Pinney's standing to complain of an alleged conspiracy by defendants: to restrain the business of providing water carriage for iron ore and of building ships for such carriage; to maintain the same dock handling charges for bulkers and self-unloaders; and to monopolize the business of providing land transportation for iron ore and other goods moving over the lower Great Lakes docks.

In its jurisdiction order, this court disagreed with all of B&LE's challenges to Pinney's standing except for Pinney's allegations regarding monopolization of land transportation. With respect to the land transportation issues, the court agreed

that Pinney was not the proper party to raise such allegations since the "alleged conspiracy to monopolize the land transportation of iron ore presents legal and factual issues wholly distinct from those generated by the alleged conspiracy to monopolize dock services." Jur. Op. at 62. However, the court also stated that plaintiff is entitled to prove that "a group boycott of its dock effectively precluded it from competing with defendants" and that "defendants conspiratorially harassed it in its attempts to truck iron ore from its dock, subject to the limitations imposed by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 1271 (1961)." *Id.* at 62-63.

In its motion for reconsideration, B&LE first argues that the court analyzed Pinney's standing to sue solely in terms of its allegation regarding commodity line haul rates on iron ore. Next, questioning in particular Pinney's standing to complain of the "handling charge issue," B&LE asks the court "in accordance with the teaching of *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, [513 F. Supp. 1100 (E.D. Pa. 1981)], to substantively address Bessemer's motion to dismiss certain of Pinney's claims for lack of standing under § 4 of the Clayton Act." In a letter to the court dated January 13, 1984, B&LE acknowledged its previous reliance on *Zenith* and noted that *Zenith* was affirmed in part and reversed in part by the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, Nos. 81-2331—81-2333 (Dec. 5, 1983), but indicated that their argument is not undercut by the partial reversal.

B&LE's argument that the court addressed Pinney's standing "solely" in terms of the alleged restrictions on commodity line haul rates is without merit. Indeed, as B&LE notes in footnote three of its letter, this court "did hold that Pinney lacked standing to complain that defendants conspired to eliminate competition in and monopolize the business of land transportation for iron ore and other goods moving over docks on the lower Great Lakes." Given this holding, it is obvious that the court did not address Pinney's standing solely in terms of the commodity line haul rate issue.

The Third Circuit's decision in *Japanese Electronic* does not support B&LE's arguments with respect to standing. In that case, the plaintiffs were two United States manufacturers of television receivers who alleged that Japanese manufacturers of similar products engaged in a conspiracy to eliminate United States competitors by keeping prices artificially high in Japan and low in the United States. As part of the conspiracy to sell at artificially low prices in the United States, plaintiffs alleged that defendants entered an agreement which established minimum prices for television receivers sold for export. The district court held that plaintiffs did not have standing to complain of alleged minimum price agreement regarding exports to the United States because the plaintiffs could not have been injured by such agreement. The district court reasoned:

It is self-evident that an agreement which places a floor under the price one's competition can charge keeps the price up, leaving one free to compete above that price. While injuring the consumer, such an agreement cannot injure the competitor.

Zenith, 513 F. Supp. at 1160.

On appeal, the Third Circuit reversed the district court on the issue of plaintiff's standing to complain of the minimum price agreement. The appellate court agreed that if the minimum price agreement were viewed alone, plaintiffs would not have standing to bring this claim:

Since, however, the effect of a horizontal agreement among manufacturers to set minimum prices would in isolation protect non-party competitors like NUE and Zenith from competition, they could not, absent other circumstances, bring a section 4 suit because they could not show the requisite injury to their business or property.

Japanese Electronics, *supra*, at 1027. Nevertheless, the appellate court examined evidence of "other circumstances" suggesting that plaintiffs may have been injured "from what they refer to as an export cartel." *Id.* The court first noted that

there is evidence from which a fact-finder might conclude that the minimum prices agreed upon were in fact dumping prices. . . . The collusive establishment of dumping prices could support an inference of collective predatory intention to harm American competitors.

Id. The court then noted other evidence which would permit inferences of predatory pricing, of efforts to conceal activities and of a horizontal price-fixing agreement. The court concluded:

Thus a fact-finder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market.

Id. Thus, the Third Circuit held that a finding of a conspiracy to sell at artificially high prices in Japan and, at the same time, minimum low prices in the United States, would support liability under section 4 of the Clayton Act, assuming plaintiffs could show they were in fact damaged.

In reversing the district court's decision with respect to standing, the Third Circuit did not evaluate one part of the conspiracy "in isolation," but rather considered all the evidence from the "export cartel." B&LE, in an attempt to use *Japanese Electronic* to support its argument, contends:

The court of appeals did not question the ruling below that plaintiffs' standing to seek antitrust recovery must be separately analyzed as to discrete aspects of an alleged unitary conspiracy. Rather, the court of appeals itself undertook such analysis.

Respectfully, this court disagrees. The Third Circuit did not merely question an analysis which separates parts of an alleged conspiracy and ignores other relevant circumstances, but the court reversed on this very issue. Moreover, in the instant case, as this court concluded in its jurisdiction order, the alleged

conspiracy to maintain dock handling charges in order to discourage the development of self-unloaders "relates directly to plaintiff's claim that defendants sought to eliminate its competition in the dock handling of ex-lake iron ore." Jur. Op. at 61.

In its most recent submission, B&LE also relies on *In re Wheat Rail Freight Rate Antitrust Litigation*, MDL 534 (N.D. Ill. Dec. 8, 1983). In that case, defendant railroads counterclaimed against plaintiff shippers alleging that the railroads were victims of collusive action by the shippers to increase the shippers' profits in violation of the Sherman Act. Defendants' counterclaim alleged that the shippers established a "base point pricing" system which enabled them to charge phantom freight charges to their customers. The counterclaim also alleged a conspiracy to hold down freight costs on wheat and wheat products in various ways. In short, the railroads were complaining of a "two-headed conspiracy," where shippers tried to increase profits by keeping the freight costs they charged their buyers up and those paid to the railroads down.

The court in *Wheat Rail* considered the standing of the railroads to complain of the base-point pricing system. The court stated:

When the present motions to dismiss were filed, nothing suggested that the railroads were purchasers of wheat products subject to the base point pricing system. Thus, the shippers pointed out that to the extent that the railroads' counterclaims were *aimed at that system alone*, the railroads were harmed only indirectly and that the only proper plaintiffs to raise such a claim would be the buyers themselves. We agree. *See Associated General Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 908-13 (1983) (person not a consumer or competitor in the market in which trade was restrained cannot bring antitrust claim).

Slip op. at 5 (emphasis added). The court then noted that in response to the motions, the railroads disclaimed any intention

to attack the base-point pricing system. With respect to the other allegations, the court applied the standards for antitrust standing set forth in *Associated General Contractors v. California State Council of Carpenters*, U.S., 103 S. Ct. 897 (1983), and held that the railroads met those standards. The court stated:

Their claim involves a conspiracy alleged to be directed purposefully at them that deprives them of freight revenues that they would receive absent the conspiracy; they are competitors in the market in which trade was restrained, that is, the market for the purchase of rail freight services though proof of the exact measure of damages may involve difficult concepts, the fact of damage is not speculative of the railroad's allegations are true; and apart from certain considerations that we will discuss below there is no risk of complex apportionment or duplicative recovery.

Slip op. at 7-8 (footnotes omitted).

Unlike the dock handling charge allegations here, the "base point pricing" allegations that were disregarded by the court in *Wheat Rail* for lack of standing were not directly related to the railroads' alleged injury. The base-point pricing system was directed at the customers of the shippers, not the railroads. In contrast, as previously noted, in the instant case the dock handling charge allegations relate directly to the injury allegedly sustained by Pinney. These allegations are an integral part of the conspiracy that Pinney alleges to be "directed purposefully at them" and that deprived them of revenues that they would have received absent the conspiracy.

After reconsideration, this court reaffirms the rulings it made on the standing issues as set forth in the jurisdiction order.²⁰

²⁰ In *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290 (6th Cir. 1983), the Sixth Circuit noted that in *Southhaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 (6th Cir. 1983), the court "resolved 'to consider, henceforth, the § 4 inquiry on a case by case basis by applying the criteria defined in *Associated General Contractors*.'" In passing on the "standing" issue raised by B&LE, this court adopted that approach.

VI.

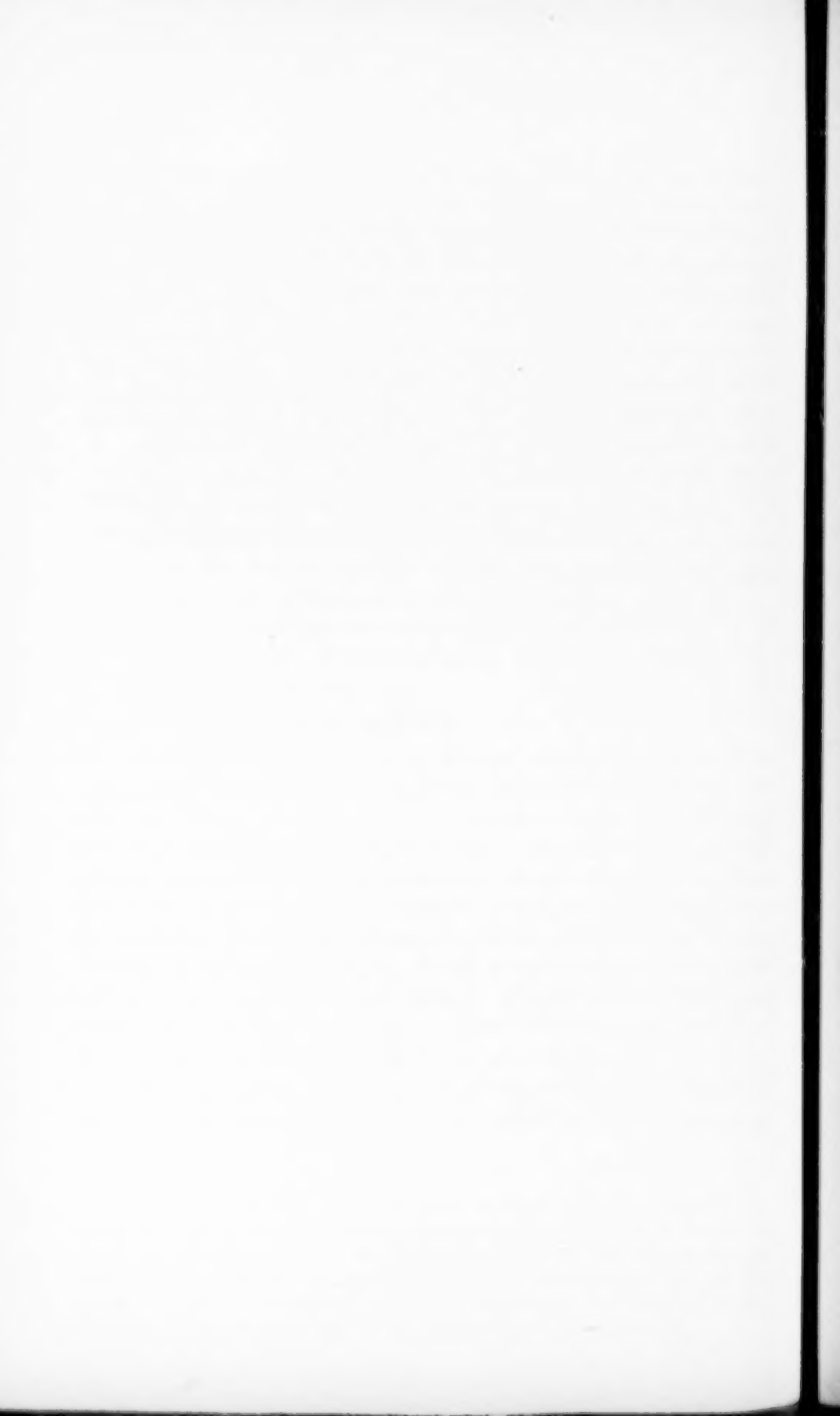
The court has prepared a ruling on the defendants' alternative request for certification for an immediate appeal under 28 U.S.C. § 1292(b). However, the plaintiff's responses to the inquiries propounded in parts II and IV may affect the content of the certification memorandum and even the final resolution of the certification question. In any event, by propounding the inquiries to plaintiff, the court thereby delays the ripeness of the time of filing the ruling on the certification request. Hence, the court defers filing the certification ruling.

Subject to the court's orders in parts II and IV, the court overrules motions for reconsideration of its jurisdictional memorandum and order of June 21, 1983.

IT IS SO ORDERED.

/s/ WILLIAM THOMAS

U.S. District Senior Judge



APPENDIX G

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

C80-1733

PINNEY DOCK & TRANSPORT COMPANY
Plaintiff

v.

PENN CENTRAL CORPORATION, et al.
Defendants

MEMORANDUM AND ORDER

THOMAS, Senior Judge

In this memorandum and order, the court considers several issues which have now matured and are ready for ruling. The court will first review plaintiff's response to the directives in parts II and IV of the court's memorandum and order of March 29, 1984 (cited as "Recon. Op."). Next, the court will consider defendants' motions requesting certification of the following rulings of this court for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): the jurisdictional memorandum and order of June 21, 1983 (cited as "Jur. Op."), and the June 21, 1983 memorandum and order relating to statute of limitations issues (cited as "Stat. Lim. Op."). Finally, the court will consider plaintiff's motion for reconsideration of the court's June 30, 1983 refusal to certify for interlocutory appeal its October 1, 1982 memorandum and order relating to Ohio Valentine Act issues (cited as "Valen. Op.").

I.

Defendants Norfolk and Western (N&W) and Bessemer and Lake Erie (B&LE) moved for reconsideration of this

court's jurisdictional order of June 21, 1983. In its memorandum and order of March 29, 1984, this court overruled those motions "[s]ubject to the court's orders in parts II and IV."

In part II, the court reconsidered the application of the Supreme Court's decision in *Keogh v. C&N W. Ry. Co.*, 260 U.S. 156 (1922), to the instant case. The court concluded:

Although the question has not been previously addressed by the parties, it would appear that if the plaintiff intends to prove damages by establishing a hypothetical line-haul rate or hypothetical handling charges the court would lack the authority to ascertain such hypothetical rates and would not be able to refer the question to the Commission for determination. Since dismissal of the plaintiff's claim would appear to then be the only alternative, the earliest resolution of the issue is important to all parties. Hence, the court directs the plaintiff within 30 days of the date of this memorandum and order to file a written statement declaring whether or not the plaintiff, in proving damages, intends to ask the court to make any of the foregoing or similar determinations.

Recon. Op. at 20.

On April 30, 1984, Pinney filed its response to the court's March 29, 1984 order. The court finds adequate Pinney's response. The court reaffirms the conclusion reached in its jurisdictional order, that "[s]hould plaintiff prove its allegations, it will not be barred by *Keogh* ... from recovering damages." Jur. Op. at 53-54.

In part IV, the court reconsidered the possible application of the doctrine of primary jurisdiction to this case. The court concluded that "the Commission's special expertise is not needed to examine and make findings of what occurred at the numerous 'informal' meetings of members of the CCIOC as reported in the several unpublished several sets of minutes." Recon. Op. at 46. However, the court also determined that

if plaintiff intends to claim that either the Eastern Railroad's 5a agreement or the Commission's proce-

dures or practices in administering such agreements did not provide for or permit the joint discussion and actions or proceedings, then such a claim presents a question which should initially be referred to the commission.

Id. at 47. The court then directed plaintiff to

indicate in writing within 30 days of the date of this memorandum and order what its intentions are with reference to this matter. If plaintiff intends to make such a claim, plaintiff should so indicate. Thereupon, this court will determine whether a reference to the Commission is appropriate.

Id. at 47-48.

The court finds adequate plaintiff's response to the court's directive on page 47 of its reconsideration order. The court concludes that reference to the Interstate Commerce Commission is not required and would not be appropriate. Thus, the court reaffirms the conclusion reached in its jurisdictional order that "reference to the Commission is deemed unnecessary and inexpedient." *Jur. Op.* at 66.

II.

The governing statute, 28 U.S.C. § 1292(b), permits certification of an otherwise unappealable order when the district court determines that its order (1) "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal may materially advance the ultimate termination of the litigation."

In this circuit, interlocutory orders are certified under 1292(b) only in exceptional cases. *Kraus v. Board of County Road Commissioners*, 364 F.2d 919 (6th Cir. 1966); *accord Lynch v. Johns-Manville Sales Corp.*, 701 F.2d 44, 45 (6th Cir. 1983). In *Kraus*, the court denied an application for appeal of an interlocutory order of a district court denying summary judgment in an automobile accident case. The court stated

"[t]his statute was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of in a few days." *Kraus*, 364 F.2d at 922. The court in *Kraus* reviewed the purpose of section 1292(b) by quoting from a report of the committee of the Judicial Conference of the United States, which endorsed this legislation, including the following quotation:

Your Committee is of the view that the appeal from interlocutory orders thus provided should and will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, *as in antitrust and similar protracted cases*, where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided, as in the recent case of *Austrian v. Williams* (2 Cir. 198 F.2d 697).

Id. at 921 (emphasis added).

Since *Kraus*, this circuit has continued to criticize certification in "ordinary" personal injury or wrongful death suits. *Cardwell v. Chesapeake & Ohio Railway Co.*, 504 F.2d 444, 447 (6th Cir. 1974). In contrast, this circuit has upheld the certification of an interlocutory, pretrial order in an antitrust case. *Obron v. Union Camp Corp.*, 355 F. Supp. 902, 904-05 (E.D. Mich. 1972), *aff'd*, 477 F.2d 542 (6th Cir. 1973). In *Obron*, the district court's order held that defendants could rely on the "passing on defense" in a suit under the Clayton and Sherman Acts. In certifying the order for appeal under section 1292(b), the district court noted "[t]he Courts, generally, have determined that the above section is readily applicable to antitrust cases." *Id.* at 904.

A.

As an alternative to their motions for reconsideration, N&W and B&LE move for an amendment to the court's June 21, 1983 jurisdictional order to include the certification required by 28 U.S.C. § 1292(b) to permit interlocutory appeal from

this order. The Chessie defendants (Baltimore & Ohio Railroad Company, Chesapeake & Ohio Railway Company, and CSX Corporation) also move for certification to appeal.

To determine whether this court's June 21, 1983 jurisdictional order meets the requirements of section 1292(b), the court first considers whether this order involves a "controlling question of law." If the court is in error on the jurisdictional issues, this error would warrant reversal on final appeal. *Cf. Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974). In addition, if the court is in error and is reversed, this would contribute to the determination at an early stage of another antitrust case before this court, *Litton Industries, Inc. v. Penn Central Corp.*, C81-372, which is based on substantially the same facts and is against substantially the same defendants. An appellate ruling may also affect several other antitrust cases involving the same issues, at least in part, filed in this and other courts.¹ *Cf. Kohn v. Royall*, 59 F.R.D. 515, 525 (S.D.N.Y. 1973). Thus, the first requirement of section 1292(b) is met.

The second requirement of section 1292(b) is also satisfied in this case. This court's order decided several jurisdictional questions for which "there is substantial ground for difference of opinion." Although on March 29, 1984 this court reaffirmed its previous order of June 21, 1983 denying defendants' motions for summary judgment, defendants have presented many strong arguments to support their positions on questions of law which are not settled. Further, in determining whether there is

¹ The following cases filed with this court and other courts have recently been transferred by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407 to the Eastern District of Pennsylvania for pretrial proceedings: *Wills Trucking v. Baltimore & Ohio Railroad Co., Inc.*, C82-759 (N.D. Ohio); *R. Weise Trucking v. Baltimore & Ohio Railroad Co., Inc.*, C82-3816 (N.D. Ohio); *C.D. Ambrosia Trucking Co., Inc. v. Chesapeake & Ohio Railway Co., Inc.*, C84-398 (N.D. Ohio); *Jones & Laughlin Steel, Inc. v. Penn Central Corporation*, C83-1688 (D.D.C.); *Wheeling-Pittsburgh Steel Corp. v. Penn Central Corp.*, C83-3317 (D.D.C.); *National Steel Corp. v. Penn Central Corp.*, C83-3328 (D.D.C.); *Republic Steel Corp. v. Penn Central Corp.*, C83-4413 (S.D.N.Y.). In addition, two other similar cases before this court will probably be transferred: *Tauro Brothers Trucking Co. v. Baltimore & Ohio Railroad Co., Inc.*, C83-7784 (N.D. Ohio), and *David W. Reaney v. Chesapeake & Ohio Railway Co., Inc.*, C84-877 (N.D. Ohio).

a "substantial ground for difference of opinion" on a legal question which critically affects a complex antitrust case, "a narrow approach is not justified." *Atlantic City Electric Company v. General Electric Company*, 207 F. Supp. 613, 620, *aff'd*, 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *accord Garner v. Wolfinbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970). In the instant case, where complex future proceedings depend on these initial questions of jurisdiction, there is "substantial ground for difference of opinion."

The third requirement of section 1292(b) is that immediate appeal from this order would "materially advance the ultimate termination of the litigation." In determining whether this requirement is met, one consideration is whether there would be a net reduction in the duration or cost of the litigation should the order be reversed. *See Strong v. Bucyrus-Erie Co.*, 476 F. Supp. 224, (E.D. Wisc. 1979) (citing Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv.L.Rev. 607, 624 (1975)).

Should this court's order be reversed on one or more of the issues of express immunity, implied immunity, exclusive jurisdiction, the *Keogh* doctrine, or standing, that decision would dispose of this case, terminating potentially lengthy proceedings before this court,² and would critically affect the disposition of other related cases. Thus, immediate appeal from all but one of the issues determined in this court's jurisdictional order would "materially advance the ultimate termination of this litigation."

The issue of primary jurisdiction only becomes an issue for the court of appeals to consider should it affirm this court's determination that it has correctly decided the other issues which have been certified. Separately, the issue of primary jurisdiction probably would not warrant certification. However, since it arises out of the same nucleus of facts as the other

² As defendant N&W points out, presentation of the prosecution's case against only N&W in the companion criminal case, *U.S. v. Bessemer and Lake Erie R. Co.*, 717 F.2d 593 (D.C. Cir. 1983), took more than three weeks.

issues, primary jurisdiction is properly treated as a controlling issue that should be certified, even though referral of the cited questions to the ICC for ruling may not reduce the duration or cost of the litigation. Overall, if the court of appeals finds it necessary to review this court's adjudication of the issue of primary jurisdiction, the court of appeals determination will also "materially advance the ultimate termination of this litigation."

All three requirements for interlocutory appeal under section 1292(b) are, therefore, met as to this court's June 21, 1983 jurisdictional order. Certification of this order is in accord with the certification of orders involving the same or similar issues in other antitrust cases by courts in both this and other circuits. *Sound, Inc. v. American Telephone and Telegraph Co.*, 631 F.2d 1324, 1326 (8th Cir. 1980) (implied immunity); *Bartholomew v. Virginia Chiropractors Association Inc.*, 612 F.2d 812 (4th Cir. 1979) (express immunity); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1143 (6th Cir. 1975) (standing under section 4 of the Clayton Act); *City of Mishawaka, Indiana v. Indiana & Michigan Electric Company*, 560 F.2d 1314, 1318 (7th Cir. 1977) (primary jurisdiction); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203, 204 (9th Cir. 1973) (primary jurisdiction).

B.

On the same day that the court filed its jurisdictional memorandum and order, June 21, 1983, it also filed a memorandum and order overruling defendants' motions to dismiss based on the four-year statute of limitations of section 4B of the Clayton Act. On August 8, 1983, defendant N&W and the Chessie defendants filed a motion seeking an amendment to the statute of limitations order to include certification for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). Defendant B&LE joined in this motion by its letter to the court of September 2, 1983.

The court's statute of limitations order "involves a controlling question of law as to which there is substantial ground

for difference of opinion.” In that order, the court applied *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975), which set forth the elements that plaintiff must prove to toll the four-year statute of limitations. In overruling defendants motions, the court concluded that “genuine issues of fact exist as to each of the three elements which under *Dayco*, *supra*, plaintiff must ultimately prove to establish fraudulent concealment.” Stat. Lim. Op. at 63.

In drawing this conclusion, the court held that under *Dayco*’s first element, “wrongful concealment of their actions by defendants,” 523 F.2d at 394, “the type of actions which might wrongfully conceal a conspiracy can embrace, but are not limited to, fraudulent misrepresentations as articulated in the *Rutledge* reference [576 F.2d 248, 250 (9th Cir. 1978)].” Stat. Lim. Op. at 11. In so holding, the court rejected defendants’ arguments, based in part on the *Rutledge* case, that Pinney must show affirmative acts of concealment by the defendants in order to establish the first element of *Dayco*. As this example shows, the interpretation and application of the elements of fraudulent concealment set forth in *Dayco* is a controlling question of law, and a question for which there is a substantial ground for difference of opinion.

In addition, the court finds that immediate appeal from its statute of limitations order would “materially advance the ultimate termination of the litigation.” An appellate ruling reversing on the statute of limitations issue would dispose of this case, subject only to the Valentine Act certified issue, *see infra* at 13-15.

Thus, all three requirements for interlocutory appeal are met for the court’s June 21, 1983 statute of limitations order. Certification of this order is in accord with the certification of a statute of limitations question involving the doctrine of fraudulent concealment in *Atlantic City Electric Company*, *supra*, at 619. In discussing whether the second element of 28 U.S.C. § 1292(b) was met, the court stated:

[T]he practical problem here is whether a four-year cut-off period will be applied to claims which might otherwise, in some cases, go back to the 1940's. Determination of this question affects the scope of discovery procedure, the length and complexity of ultimate trial, and the expenditure of time, money and effort which these cases will engender. These are strong reasons for having the issue of construction of Section 4B conclusively determined and determined expeditiously.

Id. at 620. Similarly, here, there are strong reasons for having the interpretation and application of the doctrine of fraudulent concealment to be conclusively and expeditiously resolved.

C.

In its October 1, 1982 memorandum and order, this court held that "Clayton § 4B [four-year statute of limitations] preempts O.R.C. § 1331.12 as to plaintiff's Valentine Act [anti-monopoly] claims based on anticompetitive effects on interstate commerce. . . ." ³ Plaintiff moved for reconsideration of that ruling or, alternatively, for certification to appeal pursuant to 28 U.S.C. § 1292(b). In a memorandum and order of June 30, 1983, the court denied plaintiff's motion. Plaintiff now moves for reconsideration of that portion of the court's June 30, 1983 ruling that denied certification to appeal. Plaintiff says that since the court is certifying the issues on which the court has ruled against the defendants, it is essential to certify the court's ruling on the Ohio Valentine Act, which has no statute of limitations.

Based on the court's conclusions herein to certify other orders for interlocutory appeal, it is appropriate to now reconsi-

³ O.R.C. § 1331.12 provides in part:

No statute of limitation shall prevent or be a bar to any suit or proceeding for any violation of sections 1331.01 to 1331.14, inclusive, of the Revised Code.

der its earlier denial of certification. In its earlier motion for reconsideration or certification, plaintiff argued that there was a "fundamental conflict between the Court's reasoning in inferring a congressional intent to preempt and the holding of the Supreme Court in *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978)." In *Exxon*, the Court considered whether a Maryland price discrimination statute requiring uniform allowances was preempted by congressional policy expressed in the "meeting-competition defense" of section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act. The Court held that section 2(b) did not preempt the Maryland statute. In so holding, the Court found that the Maryland statute could be sustained without undermining the congressional objective of ending unfair price discrimination.

Nevertheless, in its October 1, 1982 ruling, this court determined that preemptive intent must be implied where both the state and federal statutes cannot "be enforced without impairing the federal superintendence of the field." Further, this court found that there was such preemptive intent in Clayton § 4B, because the congressional objectives behind the four-year statute of limitations would be circumvented if states could vary this limitations period.

In the present ruling, the court certifies its June 21, 1983 statute of limitations ruling, which finds that there exist questions of material fact as to whether the elements of the fraudulent concealment doctrine, tolling the Clayton § 4B four-year statute of limitations, are satisfied in this case. Should that ruling be reversed on interlocutory appeal, or should the plaintiff fail to prove any of the elements of the fraudulent concealment doctrine, the federal antitrust claims would be dismissed. However, the issue of this court's previous dismissal of the plaintiff's Ohio Valentine Act claims would then become a final order subject to appeal under 28 U.S.C. § 1292(a). Since other interlocutory orders are herein certified for appeal,

the court finds it would advance the "ultimate termination" of this litigation to have all of the interlocutory rulings reviewed at this time. Further, on reconsideration, the court finds that its determination that Clayton § 4B preempts O.R.C. § 1331.12, in light of *Exxon*, is a question of law for which there is "substantial ground for difference of opinion."

Given all the circumstances, some of which were not present on June 30, 1983, the court now determines that its order of October 1, 1982 "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

III.

Pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure, this court's jurisdictional order of June 21, 1983, as supplemented by this court's order of March 29, 1984 and part I of the present order, is amended to include the following statement:

The court is of the opinion that this order involves a controlling question of law for which there is a substantial ground for difference of opinion and that immediate appeal may materially advance the ultimate termination of this litigation.

Further, this court's statute of limitations order of June 21, 1983 and the Valentine Act order of October 1, 1982 are each hereby amended to include the foregoing statement.

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Pursuant to 28 U.S.C. § 1292(b), the trial of this case is stayed pending further order of the court.

IT IS SO ORDERED.

/s/ WILLIAM THOMAS

U.S. District Senior Judge

APPENDIX H



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No. 84-8346

No. 84-8347

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PINNEY DOCK & TRANSPORT CO.,

Plaintiff-Petitioner,
(No. 84-8346)

v.

PENN CENTRAL CORP., *et al.*,

*Defendants-
Respondents.*

ORDER

PINNEY DOCK & TRANSPORT CO.,

*Plaintiff-
Respondent,*
(No. 84-8347)

v.

PENN CENTRAL CORP., *et al.*,

*Defendants-
Petitioners.*

BEFORE: KEITH, MARTIN and CONTIE, Circuit Judges

Pursuant to 28 U.S.C. ¶ 1292(b) and Rule 5, Federal Rules of Appellate Procedure, the parties to this antitrust action have filed two petitions for leave to appeal interlocutory orders of the district court.

Upon consideration of these petitions and the materials thereto,

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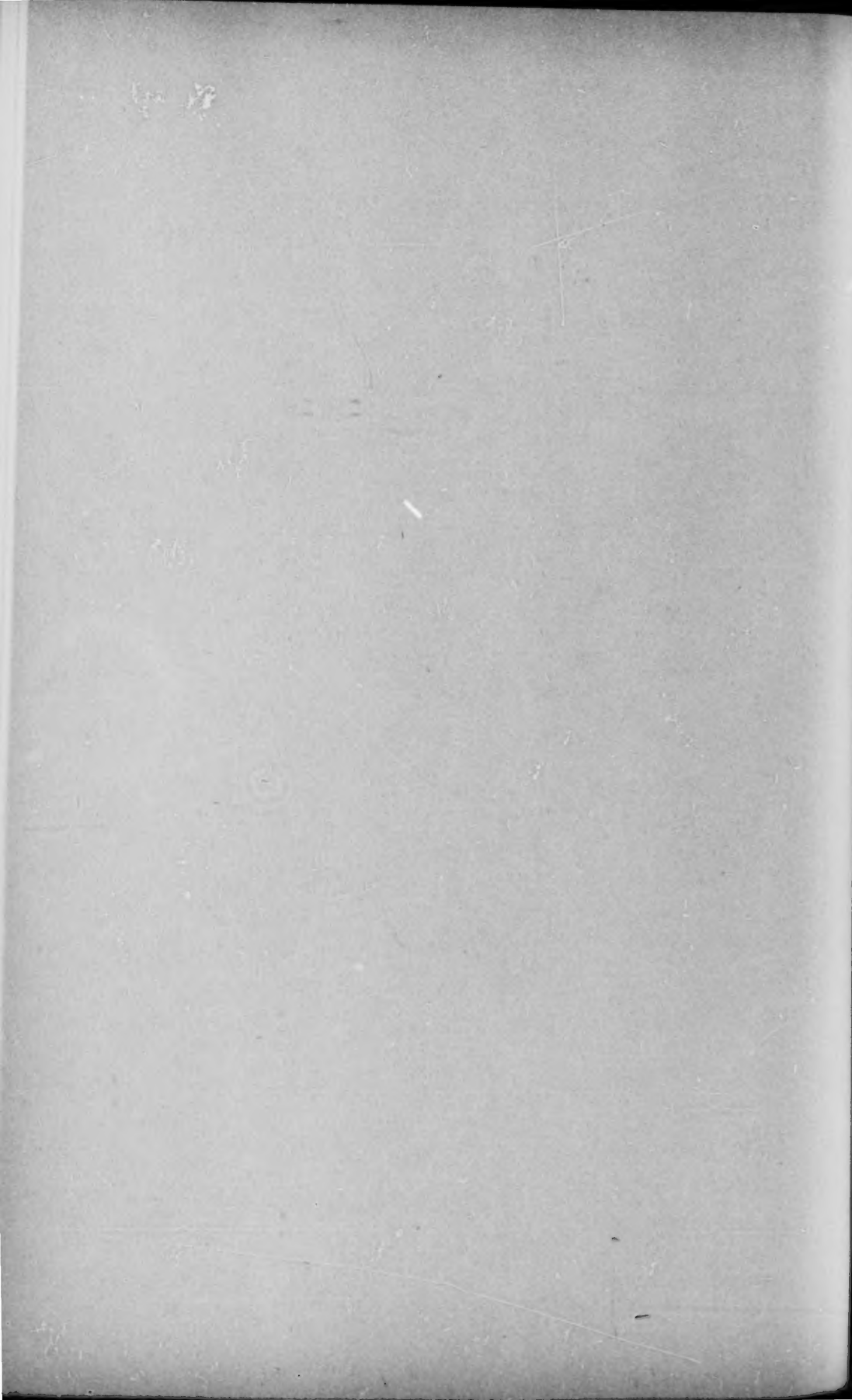
IT IS ORDERED that said petitions be and they hereby
are granted.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN

Clerk

APPENDIX I



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C81-372

LITTON INDUSTRIES, INC., *et al.*
Plaintiffs

v.

PENN CENTRAL CORPORATION, *et al.*
Defendants

MEMORANDUM AND ORDER

THOMAS, Senior Judge

Plaintiffs' complaint, filed on March 5, 1981, alleges that defendants engaged in an antitrust conspiracy in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 3 of the Clayton Act, 15 U.S.C. § 14, as well as various sections of Ohio's Valentine Act, Ohio Rev. Code Ann. Ch. 1331.¹ More specifically, plaintiffs allege the following:

[D]efendants deliberately and directly acted, combined and conspired to restrain and suppress trade in the business of carrying iron ore and other bulk commodities in self-unloading and certain bulkers moving on the Great Lakes, in the business of designing, constructing, selling, chartering and using self-unloading vessels on the Great Lakes, and in the business of providing dock services for iron ore and other bulk commodities moving over docks on the Great Lakes.

Plaintiffs allege that defendants carried out this conspiracy by means of several overt acts and practices. For example,

¹ Plaintiffs allege violations of sections 1331.01-02, 1331.04, 1331.06, 1331.08, 1331.12 and 1331.14 of the Ohio Revised Code. See *infra* note 3.

defendants allegedly refused "to permit Litton to purchase, lease or use dock facilities which would have accomodated the technologically advanced self-unloading vessels being designed and constructed by Litton," and imposed "artificial, arbitrarily high and unjustifiable dock handling charges on iron ore discharged from self-unloading vessels, in order to discourage and prevent the use of such vessels."

Plaintiffs in this action are Litton Industries, Inc., Litton Systems, Inc., Litton Great Lakes Corporation and Erie Marine, Inc. (hereinafter Litton). The latter three companies are wholly owned subsidiaries of Litton Industries. Plaintiffs' interrogatory answers indicate that

Litton Industries' Great Lakes business was conducted by certain Litton subsidiaries. These subsidiaries included Litton Great Lakes Corporation, Erie Marine, Inc., Litton Systems, Inc., through its Wilson Marine Transit Company division, and Marine Consultants and Designers, Inc.

Litton began its Great Lakes shipping business in the mid-1960's after it "concluded that the Great Lakes fleets were disproportionately old and that there was a substantial market for the construction and operation of new, supersized self-unloading vessels." Litton Great Lakes Corporation and Erie Marine were incorporated in 1965 and 1967, respectively. Litton acquired Wilson Marine Transit in 1966 and Marine Consultants and Designers in 1967.²

Defendants in this action are the Baltimore & Ohio Railroad Company (B&O), the Chesapeake & Ohio Railway Company (C&O), the Chessie System, Inc., and CSX Corporation (hereinafter B&O, C&O, the Chessie System and CSX will be collectively referred to as Chessie), Bessemer and Lake

² During the relevant time period E. Lawrence Gay, Richard Quinn and Victor L. Preisser served as president, in that order, and John B. Cogan and Ellis B. Gardner served as vice-president of Litton Great Lakes Corporation; Ernest J. Andberg served as president of Wilson Marine Transit Company Division of Litton Systems, Inc.; and Ellis B. Gardner served as vice-president of Erie Marine, Inc.

Erie Railroad Company (B&LE), and Norfolk and Western Railway Company (N&W). All the defendants move for summary judgment on the ground that the action is barred by the relevant statute of limitations. In addition, N&W contends that plaintiffs' failure on the Great Lakes did not result from any action taken by defendants.

I.

A.

The applicable statute of limitations governing plaintiffs' antitrust action is section 4B of the Clayton Act, 15 U.S.C. § 15b, which reads in relevant part:

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.³

³ On April 21, 1982, plaintiffs moved for leave to file an amended complaint "to clarify its state law allegations by alleging anticompetitive injury to intrastate as well as interstate commerce." In response to a similar motion to amend the complaint in *Pinney*, the court denied the motion in a memorandum and order of October 1, 1982, ruling that plaintiff's allegations relate only to interstate commerce. In a separate memorandum and order filed the same day the court ruled that "Clayton § 4B of the Act preempts Ohio Revised Code § 1331.12 [which provides no statute of limitations] as to plaintiff's Valentine Act claims based on anticompetitive effects on interstate commerce." Slip op. at 32-33. The court further held that since "plaintiff's allegations of fact relate only to interstate commerce . . . plaintiff's Valentine Act claims are governed by Clayton 4B's four-year statute of limitations." *Id.* at 33.

The trade and commerce involved in the instant case is identical to that in *Pinney*. The court hereby adopts the reasoning set forth in the two *Pinney* rulings filed October 1, 1982. Thus, the court concludes that plaintiffs' allegations relate only to interstate commerce, and plaintiffs' motion for leave to file an amended complaint is hereby denied. Further, the court holds that plaintiffs' Valentine Act claims are governed by Clayton § 4B's four-year statute of limitations.

The Sixth Circuit recognizes that the four-year statute of limitations "commences to run from the commission of the last overt act causing injury or damage." *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); (relying on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)); *accord Fontana Aviation, Inc. v. Baldinelli*, 575 F.2d 1194, 1195 (6th Cir. 1978).

Defendants contend that the four-year limitations period bars plaintiffs' action. Plaintiffs' complaint fixes the time period of its injury as "the period of the mid-1960s to the early 1970s." Stating the position of all defendants, N&W asserts that "any acts involving defendants which could conceivably be contemplated by the Complaint occurred well before the March 5, 1977 limitations deadline, plaintiffs having ceased operating on the Great Lakes no later than 1974."

In response, plaintiffs argue that this statutory period was tolled by the doctrine of fraudulent concealment until the time the plaintiffs discovered or should have discovered defendants' conspiracy. In their complaint, plaintiffs alleged fraudulent concealment⁴ as follows:

The violations of law of defendants and their coconspirators were fraudulently concealed by various means and actions, including misrepresentations deliberately made to Litton to cause it to believe that defendants and their coconspirators were acting lawfully and that efforts were being made to devise and carry out plans which would permit Litton to provide technologically advanced ship construction, trans-

⁴ Defendants argue that plaintiffs have failed to plead fraudulent concealment with sufficient particularity as required by Fed. R. Civ. P. 9(b). Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." As this court noted in its memorandum and order of April 11, 1984 in the related case of *Tauro Brothers Trucking Co. v. Baltimore & Ohio Railroad Co., Inc.*, C83-778Y, it is well established in this circuit that Rule 9(b) applies to pleading fraudulent concealment. The court finds that plaintiffs' fraudulent concealment pleadings here meet the particularity requirements of Rule 9(b).

portation, dock, and related services for iron ore and other bulk commodities moving over the Great Lakes. The misrepresentations and other actions were also used to falsely induce Litton to continue attempting to reach working arrangements with defendants and not to question the reasons stated by defendants for failure to reach such arrangements. Litton relied on the aforesaid misrepresentations and actions, not knowing of their false and untrue character. Litton could not by due diligence have discovered the aforesaid violations of law by defendants and their coconspirators until evidence of the violations became known in mid-1980 as a result of a settlement of a potential lawsuit between Consolidated Rail Corporation and Pinney Dock & Transport Company.

In the related case of *Pinney Dock & Transport Company v. Penn Central Corp.*, C80-1733, defendants filed summary judgment motions similar to those in the present case. In a June 21, 1983 memorandum and order (hereinafter cited as Stat. Lim. Op.), this court found in *Pinney* that there were genuine issues of material fact with respect to plaintiff's allegations of fraudulent concealment and overruled defendants' motions for summary judgment based on the four-year statute of limitations. Since the facts relevant to the allegations of fraudulent concealment in the instant case differ in part from those in *Pinney*, a separate analysis is necessary. Nevertheless, legal principles ruled upon in the *Pinney* memorandum and order are applicable here and will be adopted as noted.

In the *Pinney* statute of limitations ruling, the court followed *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975), which set forth the three elements plaintiffs must establish under the doctrine of fraudulent concealment:

- (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.

Stat. Lim. Op. at 3-4. In addition, the court noted that although the plaintiff bears the ultimate burden of proof as to each element of fraudulent concealment, on a motion for summary judgment "defendants bear the burden of clearly establishing 'that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law.' See *Adickes v. S. H. Kress & Co.*, 398, 144, 157 (1970)." *Id.* at 4. Based on the above, the court turns to whether the record reveals a genuine issue of material fact as to each of the three elements of fraudulent concealment.

In the *Pinney* ruling, the court considered the standard which should be used in determining whether a plaintiff has established the first element of *Dayco*, "wrongful concealment of their actions by the defendants." Stat. Lim. Op. at 5-12. The court concluded that the types of actions by defendants which constitute "wrongful concealment" are not limited to affirmative acts of concealment by defendants, but also include actions "which cause a conspiracy to be carried out in a 'manner which precludes detection,' e.g., 'self-concealing misconduct.'" *Id.* at 11 (citations omitted).

Plaintiffs contend that there is evidence that defendants "actively concealed" their alleged conspiracy. According to plaintiffs, defendants "formed, executed and maintained their conspiracy in secret off-the-record meetings and communications." Plaintiffs submit many exhibits to support this claim, and some examples of this evidence are cited below.

Plaintiffs' exhibits include letters and memoranda from which the trier of fact could infer that non-public meetings were held and agreements reached relating to handling charges for self-unloaders and line-haul rates from private docks throughout the late 1950's and early 1960's.⁵ There is evidence to show

⁵ According to plaintiffs, Litton did not enter the Great Lakes shipping business until the mid-1960's. Nevertheless, evidence relating to an earlier time period is considered as it is relevant to the issue of whether defendants' alleged conspiracy was being carried out in an undetectable manner at the time Litton entered the Great Lakes shipping business.

that non-public meetings were held on June 7, 1956⁶ November 12, 1957⁷ January 7, 1958⁸ and February 26, 1958.⁹

As Chessie and B&LE point out, and plaintiffs admit, there was public notice on March 8, 1958 of a proposed tariff amendment, docketed with the Coal, Coke and Iron Ore Committee (CCIOC), concerning line-haul rates. The proposed amendment and related communications were reviewed in the *Pinney* statute of limitations order, where the court concluded that "it cannot be ruled as a matter of law that such publication overcomes the evidence of secret acts by defendant railroads' representatives to conceal their non-public meetings and unpublicized anticompetitive agreements." Stat. Lim. Op. at 18.

Plaintiffs submit evidence supporting their argument that in the early 1960's the other railroads, through private meetings and communications, pressured the B&O to withdraw its 1960 proposal to publish reduced handling charges for self-unloaders. In a May 2, 1961 letter to J. K. Thorney, director of Coal Commercial Planning for the B&O, S. S. McKinlay, also with the B&O, explained:

⁶ See memorandum of June 12, 1956 by H. H. Lippold (Penn Central) and letter of June 20, 1956 from S. S. McKinlay (B&O) to S. I. Thompson. Stat. Lim. Op. at 12-14. Referring to handling charges, the memo states:

It was unanimously agreed it would be desirable and proper that [an] aggregate charge of 40 cents be applied uniformly by all railroads regardless of the actual service performed or its costs, and that consideration be given to tariff changes which may be necessary.

The memo indicates that this agreement was a secret one:

The above is not a proposal and *the understanding was that until conclusions are reached, including the policy of each individual railroad, the foregoing will not be publicized.*

(Emphasis added.)

⁷ See letter of November 14, 1957 from S. S. McKinlay (B&O) to S.I. Thompson.

⁸ See "Call for Special Meeting" of December 24, 1957 from R.S. Kern, chairman of the Coal, Coke and Iron Ore Committee.

⁹ See letter of March 3, 1958 from R. S. Kern.

Over the previous few years, the carriers, to protect their large investments in unloading facilities at the Lake Erie ports, had agreed to assess the same handling charges on self-unloaders as are applied to bulk freighters.

As a result of the Republic Steel matter, to clarify the picture and to make for uniformity on the part of all lines, we filed C.T.R. Submittal 11059 proposing reduced handling charges for self-unloader ore cargoes.

In the same letter, McKinlay described a July 26, 1960 meeting where this proposal was discussed:

In our letter of July 27, 1960, we advised that when this subject came up at the July 26 meeting, there was *considerable opposition* by all lines operating docks on Lake Erie. *We were also reminded of the agreement previously made by all lines to assess the same charges as on bulk freighters.* The matter was therefore referred to the same Special Committee that had previously discussed this subject and arrived at the aforementioned agreement (all the Lake Erie dock railroads). It also appeared that due to varying dock costs, it might be difficult to arrive at a uniform basis for lower charges.

(Emphasis added.) Plaintiffs submit evidence supporting their argument that B&O later withdrew this proposal due to pressure from the other railroads.¹⁰

Plaintiffs also submit evidence which tends to show that handling charges were discussed at non-public meetings in 1969 and 1970. For example, there is evidence that during a meeting on June 3, 1969, J. K. Thorney raised the issue of handling charges "informally" and "[r]eminded all of the roads represented at the meeting of the unanimous agreement (in 1958)

¹⁰ See September 18, 1961 letter from J. K. Thorney (B&O) to S. S. McKinlay (B&O).

which was reached between all rail lines serving docks. . . ." ¹¹ The same subject was raised "informally" in meetings on September 11, 1969¹² and March 24, 1970.¹³

The documents discussed above lead the court to draw the same conclusion as drawn from similar documents in *Pinney*: the documents would "permit an inference that the defendants took steps to insure that their actions would not become public." Stat. Lim. Op. at 22. Thus, based on the evidence noted above, there exists a genuine issue of material fact as to whether defendants wrongfully concealed the alleged conspiracy.

Plaintiffs argue that in addition to holding secret meetings and communications, defendants actively concealed their conspiracy in several ways. First, plaintiffs contend:

They purported to negotiate in good faith with Litton on potential ventures concerning dock facilities while, at the same time, engaging in secret agreements with each other to exclude Litton from the Great Lakes.

As one example, plaintiffs allege that misleading negotiations between Litton and C&O/B&O took place in the early 1970's concerning self-unloader handling charges from the railroad's Lorain and Fairport Harbor docks.

In a March 31, 1971 letter to G. A. Sandmann, vice president of the C&O/B&O, Ross Conlin, also of the C&O/B&O, reported that several meetings had taken place between C&O/B&O and Erie Marine and Wilson Marine

¹¹ See June 5, 1969 letter from J. K. Thorney to G. A. Sandmann (C&O/B&O).

¹² See letter of August 25, 1969 from J. K. Thorney to C. S. Baxter, Chairman of the CCIOC. After Thorney suggested handling charges should be discussed at a meeting on September 11, 1969, he added that "[t]his subject, of course, should not be listed on the regular docket but handled informally after the regular meeting."

¹³ In a letter marked "personal" of March 26, 1970 from J. K. Thorney to G. A. Sandmann (B&O) reporting on the meeting of March 24, Thorney noted that "[t]here was no Committee record other than the subject had been reviewed."

Transit officials "for the purpose of discussing their new 55,000 ton self-unloader for Iron Ore and its possible use at our Lorain Dock facilities beginning in April 1972." Conlin reviewed "our present tariff charges" (per ton) using Hulett's to unload conventional vessels: 30 cents for "hold to rail of vessel"; 35 cents for "rail of vessel to car"; 72 cents for "rail to storage"; and 46 cents for "dock storage to rail cars." The letter notes the total was 65 cents "from vessel direct to cars." Wilson Marine was requesting a single charge "from storage or pit into hopper cars of 25-35 [cents] per ton." Conlin reported that when he met with Victor Preisser, president of Litton Great Lakes Corporation, on March 25, Conlin quoted a 65 cent (per ton) charge for "dumping iron ore pellets into our pit by boom and then reloading into cars." In reaction, Preisser was "violently disturbed," and Conlin stated: "I can't say I blame him because he feels this rate, and our present mode of unloading, is subsidizing the old bulk carriers." In both this and a subsequent letter, Conlin said that an "out-of-pocket cost" or "reasonable charge" should be developed.¹⁴

Plaintiffs point to Preisser's "weekly activity report" for the week ending April 25, 1971 as evidence that C&O/B&O encouraged Litton with the Lorain and Fairport projects.

¹⁴ In a subsequent letter of April 5, 1971 to Sandmann after another conversation with Preisser, Conlin recommended:

Since we have an opportunity to realize a load turn-around on a high percentage of our hopper equipment thru ore loading, think we should come up with a reasonable charge on handling the ore from pit into cars.

(Handwritten underlining in exhibit.) Similarly, a letter from C.E. Schroeder (C&O/B&O) to Conlin indicates that other officials of C&O/B&O agreed with Conlin:

George Riley and I feel that some consideration should be shown Litton. Mr. Riley thinks the charge for handling should be somewhere between the 25 [cent] which Litton is requesting and the present 46 [cents] charge for ore loading from dock to car and that such charge covering self-unloaders be published separately in tariff form. I concur in this.

(Handwritten underlining in exhibit.)

Preisser reported on a meeting with C&O/B&O officials, as follows:

Met with Hays Watkins [chief executive officer of C&O/B&O] and John Hanifin (Executive Vice President of C&O B&O) to discuss self-unloading vessels and Hull #102 in particular. They are most interested in cooperating with us, making use of their Fairport facility, and entering into some sort of joint agreement with us whereby we would supply the railroad cars and perhaps lease and operate the terminal ourselves.

Preisser's April 23, 1971 file memorandum of the meeting further disclosed that Watkins and Hanifin suggested that "we consider leasing the ownership of their docks, with responsibility for transfer liability in our hands," that "we participate (or someone participate) in the ownership of the cars." There is no evidence that Litton had reason not to accept at face value these expressions of interest by C&O/B&O officials.

Documents show that at his request, Sandmann of the C&O/B&O met with other railroad representatives on April 29, 1971.¹⁵ A file memorandum of "R.F.J." (Joyce of B&LE) noted that Sandmann opened the meeting by indicating "that C&O/B&O has been engaged in extensive negotiations with Litton Industries and Youngstown Sheet and Tube Co. relative to handling Iron Ore from self-[un]loaders at Lorain and Fairport Harbor, O."¹⁶ Sandmann, however, refused to reveal his proposed handling charge, and would only say "that it was lower than the present dock-to-car charge of 46 [cents] GT now assessed on Iron Ore stored on railroad docks."

¹⁵ In an April 16, 1971 letter from Sandmann to G. R. Wallace (Penn Central Transportation Company), W. D. Roe (N&W), M. F. Coffman (Erie Lackawanna Railway), and R. B. Wooters (B&LE), Sandmann requested an "informal meeting" to discuss self-unloader handling charges.

¹⁶ Joyce further recorded that:

Mr. Sandmann indicated that this business would develop in two successive stages. In Phase I, C&O/B&O would provide a

(footnote continues)

Joyce's memo reported that the "negative reaction of the lines represented at the meeting was immediate and vocal."¹⁷ Specifically, George Wallace of Penn Central "indicated that PC had resisted similar pressures to establish comparable arrangements at the ore docks at Erie as well as Pinney Docks at Ashtabula." Moreover, as recorded by Sandmann in an April 30, 1971 memorandum,

[a]ll of the roads are unanimous that they will immediately reduce their charges applying on conventional bulk port traffic to whatever charge is made for selfunloaders so that their customers will not be placed in a competitive position with Litton.

After reviewing other "repercussions" in his memorandum, Sandmann concluded he would tell Preisser that they would not charge less than 65 cents per ton. The evidence shows that after the railroads met on April 29, C&O/B&O did not give Litton the reduced rate it had requested and which was favored by some C&O/B&O officials.

Defendants argue that instead of concealing their discussion, Litton was actually informed by C&O/B&O that the railroads were meeting to discuss handling charges. In his April 23, 1971 memorandum to file, Preisser noted that Sandmann set up a meeting with him on April 30 and that

(footnote continued)

receiving pit for self-unloaders at Lorain. The railroad would provide the service of loading cars at a proposed charge which Mr. Sandmann indicated was considerably lower than that now imposed on direct ore handled from bulk vessels. In Phase II, C&O/B&O would merely lease lake frontage to Litton or Youngstown Sheet and Tube Co. to enable them to operate in the same manner as other private ore docks owned by the steel companies on Lake Erie. Those companies provide their own services of unloading, storage, and reloading on property owned or leased by them, with the origin railroads providing only line haul service to destination.

¹⁷ This conclusion is corroborated by a May 5, 1971 "confidential" communication from C.E. Schroeder (C&O/B&O) to Sandmann (C&O/B&O) summarizing comments made at the meeting.

[t]he day before that, the 29th, he is planning to meet with other railroads to discuss their terminal strategy on the Great Lakes and the relationship of that strategy to the new jumbo self-unloaders.

(See page 2 of memorandum, dated April 26, 1971.) Further, in his weekly activity report for the week ending May 9, 1971, Preisser noted:

Met with George Sandmann, Vice-President of C&O/B&O, to discuss terminal arrangements for an inland rail movement for Youngstown Sheet & Tube. Disappointing because of Sandmann's outlook, age, and ability to comprehend the opportunity. He was intimidated by the other railroads and capitulated. He will not offer us an advantageous rate over their existing docks.

Plaintiffs contend that despite Preisser's knowledge that defendants met on April 29, officials of C&O/B&O "deliberately led Litton to believe that they remained genuinely interested in leasing either Lorain or Fairport." As Sandmann recorded in his April 30, 1971 internal memorandum, he planned to tell Preisser that C&O/B&O was unwilling to "go below the figure of 65 [cents] per ton in accepting his vessels at Lorain Dock, permitting him to discharge into our pit and reloading the ore from pit to car." At the same time, Sandmann planned to tell Preisser that C&O/B&O was willing to negotiate for the rental of "the so-called Grove Storage area."¹⁸ Yet, in the same memorandum, Sandmann stated in the paragraph discussing the Grove Storage area that

¹⁸ On the same day, Sandmann wrote to H. T. Watkins, president of the C&O/B&O, enclosing his memo and reporting:

Much to my surprise, I had a very cordial meeting with Mr. Preisser, followed by luncheon, and we were able to explore mutual problems, some of which are outlined in the attached memorandum.

He is to consider further the Grove storage area referred to in numbered paragraph six of my memorandum, and I have been able to reactivate his interest in Fairport provided we can find

(footnote continues)

[a] lease to Litton would, in effect, create a private dock, and the ore could conceivably be trucked (or at least a portion of it) to inland mills. The railroad would lose control of the property.

Plaintiffs allege that these "repeated expressions of interest in the possibility of leasing property to Litton" were "intentional efforts to deceive Litton and affirmative acts to conceal the conspiracy."

Defendants, of course, may argue to the trier of fact that the evidence shows that plaintiffs knew about the April 29 meeting of the railroads, that Preisser characterized the railroads' actions as "intimidat[ion]," and that this demonstrates that there was not "wrongful concealment" of defendants actions. Nevertheless, plaintiffs have submitted evidence which supports their contention that despite this knowledge, Litton was still misled by C&O/B&O's continued interest in lease negotiations. Thus, a genuine issue of fact exists as to whether the continued negotiations by C&O/B&O were in fact part of an effort to conceal the conspiracy.¹⁹

(footnote continued)

some arrangement to make him whole on the 10 [cent] differential. I told him that with all of the fertile brains associated with our organization, I was hopeful we could come up with something.

Other efforts have been made over the years to establish such private docks along Lake Erie and have been successfully resisted by the railroads.

Based on this and other evidence, plaintiffs argue:

If B&O/C&O was making proposals to, and scheduling appointments with the President of Litton Great Lakes Corporation, it is little wonder that Litton remained hopeful. The leasing of either Lorain or Fairport would render the railroad's adherence to a \$0.65 charge superfluous, for Litton could assess whatever handling charge it saw fit at its own dock.

¹⁹ The same analysis applies to defendants argument and supporting evidence that Litton was aware of a May 6, 1971 letter from William Moore, president of Penn Central to H. T. Watkins (C&O/B&O) warning of the "seriousness of the consequences involved in the Litton proposals for Lorain or Fairport." See memorandum by E. J. Andberg to V. L. Preisser of May 27, 1971. Given the continued negotiations with C&O/B&O, however, even if Litton became aware of the Moore letter, this does not as a matter of law show that the conspiracy was not carried out in a "manner which preclude[d] detection." See *supra* p. 8.

In addition to alleging that defendants conducted misleading negotiations, plaintiffs argue that defendants concealed the conspiracy by Penn Central's affirmative misrepresentation in early 1971 concerning its proposed handling charge. Plaintiffs contend:

When Litton questioned the reasonableness of a proposed charge for handling self-unloaders, Penn Central, acting pursuant to the conspiracy, affirmatively misrepresented the nature and import of the proposed charge. Penn Central then compounded its misrepresentation by withdrawing the proposal, misleading Litton into believing that a cost-justified charge for self-unloaders would be forthcoming.

On January 8, 1971, Penn Central filed a proposal with the CCIOC to establish a charge of \$1.41 gross ton for handling iron ore from self-unloading vessels. As explained in the March 2, 1971 memorandum of "R.F.J." (Joyce of B&LE), this rate is the "aggregate of existing charges on Iron Ore unloaded from bulk vessels," or the sum of 30 cents (hold to rail of vessel), 68 cents (rail to dock) and 43 cents (dock to car). Joyce's memorandum also states that PC's proposal "was approved under wire-vote procedure." Subsequently, Litton requested a public hearing before the CCIOC on the new rate.

On March 2, 1971, Patrick A. Manley, vice president of sales and planning for Wilson Marine, sent a letter to George Wallace, vice president of coal rates for Penn Central, stating that he "welcomed the opportunity to explain our position" on the "proposed adjustment" to handling charges. Manley enclosed the draft of a letter which he stated "announces and clarifies Wilson Marine's position, to be sent to other interested parties." That enclosed draft letter stated:

The present published rated for handling iron ore received from a vessel utilizing self-unloading equipment and then re-loaded into railroad cars is \$.43 per ton. The Penn Central now proposes increasing that charge to \$1.41 per ton. This staggering increase bears no relation to the work performed.

Litton documents show that at the time of the Manley letter, Litton believed that Penn Central had handled "YS&T" (Youngstown Sheet & Tube) 1970 shipments for 43 cents per ton.²⁰

Wallace replied to Manley's letter on March 19, 1971. Wallace stated that although "changes in circumstances make it unlikely that we will publish the approved rates at the present time," he thought he should clear up a "serious misunderstanding." Wallace continued:

Your letter states that our proposal involved "230% increase in certain iron ore handling charges" at our Lake Erie docks. The proposed letter goes on to say that "The present published rate for handling iron ore received from a vessel utilizing self-unloading equipment and then re-loaded into railroad cars is \$.43 per ton." While it may be contended there is some ambiguity in the present tariff, the statement in your letter is not correct. I attach a copy of our tariff C-43 which states our charges as being applicable "when performed by means of machinery and facilities provided by this company," and further "service will be performed only where

²⁰ A "confidential memorandum" from Andberg to Preisser dated March 16, 1970 regarding "ore delivery by self-unloader to commercial docks," includes the following items:

- | | | | |
|----|------|----------|---|
| 1) | 1957 | Rep. St. | —40,000 tons to Lorain Stockpile to car charge |
| 2) | 1968 | YS&T | —40,000 tons to Huron 36 [cents] stockpile to car charge |
| 3) | 1969 | YS&T | —One cargo (? Tons) to A&B Ashtabula 38 [cents] stockpile to car charge |
| 4) | 1970 | YS&T | —Three cargoes contracted to A&B ?? charge |

A second Litton document, a copy of Wallace's March 19, 1971 response to Manley, bears a handwritten note, dated March 25, 1971 to P.A.M. Manley. In part, the note states, "Suggest you write Wallace saying . . . you are surprised that they handled YS&T 1970 shipments for 43 [cents] check and make sure they did or are— . . ."

said machinery and facilities are able to unload the vessel." Obviously, this does not apply to self-unloaders of any type.

(Handwritten underlining omitted.) Wallace also informed Manley:

Because you have stated that your draft announced and clarifies Wilson Marine's position, to be sent to other interested parties, I am sending it to the key members of the Coal & Iron Ore Committee of the Eastern Railroads—all of whom have a major stake in the movement of iron ore.

Wallace concluded:

As I have indicated to your Company before, we are ready at any time to join with you in attempting to improve the facilities and resolve the cost problems involved in lake-rail movements of iron ore and pellets.

Manley responded, in a letter of April 6, 1971, that he was "surprised" and "disappointed" that Wallace sent copies of his draft letter to "key members" of the CCIOC "in view of the fact that you had identified an incorrect statement in that draft." Manley went on to request the names of the CCIOC members that received the draft letter, and Wallace provided those names in a letter of April 9, 1971.

Plaintiffs argue that when "Wallace responded to Manley that Penn Central had not proposed a 230% increase in handling charges for self-unloaders, because the Penn Central tariff did "not apply to self-unloaders of any type," this statement was an "overt and blatant misrepresentation." In support, plaintiffs point to a memorandum of January 21, 1971 of J. T. Bodell of Penn Central which refers to "our proposal to establish a charge of \$1.41 g.t. . . . handling ex-lake iron ore and iron ore pellets discharged from self-unloaders." To the extent plaintiffs' misrepresentation argument rests on Wallace's statements contained in the first quotation on page 22, their argument fails. Wallace's statements, read in context, did not

say that Penn Central had not proposed a \$1.41 handling charge for self-unloaders. Rather, Wallace was disputing Manley's statement that this charge was a "230% increase" in published iron ore handling charges. Wallace was merely stating Penn Central's position that there was no published handling charge rate for self-unloaders and that the published rate did not apply to self-unloaders. Indeed, the Bodell memo is consistent with this position as it uses the word "establish"—not change or increase—in connection with the proposed handling charge rate. Thus, the court finds as a matter of law no misrepresentation regarding the statements of Wallace relating to the "230% increase."

With respect to Wallace's act of sending Manley's draft letter to the other railroads, Chessie and B&LE argue that rather than concealing its informal communication concerning handling charges with other railroads, "PC had openly divulged it to Litton." However, as plaintiffs argue, there is evidence which shows Wallace did not provide Manley with a copy of his "cover letter" to the other railroads, but only a list of names.

In that March 13 cover letter to the other railroads, Wallace stated that "because of our mutual interest," he was sending them copies of Manley's correspondence and Wallace's reply. Wallace also informed them that Penn Central was

taking steps to withdraw any suggested bases for handling these vessels and we propose, in event of any future offerings of self-unloader tonnage, to consider such a vessel the same as bulk carriers until such time as generally accepted rates and charges for specialized vessels can be agreed upon and published by the lines having railroad-owned dock facilities.

Therefore, although Manley was informed that other railroads received his letter, he was not informed that at the same time, in the cover letter, they were told of Penn Central's nonpublic proposal to "consider such vessel the same as bulk carriers" until the lines owning docks could agree upon and publish rates.

Further, as previously discussed, on April 29, shortly after Wallace's March 13 letter to the other railroads, the railroads met in a non-public meeting to discuss C&O/B&O's handling charge at a rate "considerably lower than that now imposed on direct ore handled from bulk vessels." *See supra* note 16. There is evidence to show that Penn Central vocally opposed this proposal. *See supra* p. 16. Hence, the trier of fact could find that Wallace's statement to Manley on March 19, 1971 that "we are ready at any time to join with you in attempting to improve facilities and resolve cost problems involved in lake-rail movements of iron ore pellets" was an affirmative misrepresentation which contributed to defendants' wrongful concealment of their conspiracy.

Thus, the court cannot find that Litton's knowledge of the fact that Wallace distributed Manley's letter to other railroads, subsequently named, establishes as a matter of law that there was not wrongful concealment of the conspiracy.

Based on all of the evidence, the court determines there is a genuine issue of fact with respect to whether the first element of *Dayco*, wrongful concealment, is satisfied.

B.

With respect to the second element of *Dayco*, plaintiffs must ultimately prove that they failed to discover the operative facts that are the basis of their cause of action within the limitations period. For the purpose of this summary judgment motion, however, defendants must show that there is no genuine issue of fact that plaintiffs knew the operative facts of their claim more than four years before filing suit.

Plaintiffs argue that Litton knew it was having problems with defendants, but did not know defendants were participating in a conspiracy:

Litton knew that defendants were conservative, resistant to change. But Litton did not know that defendants were engaged in an ongoing conspiracy to stifle the precise technological innovation on which

Litton's business depended. Litton thought defendants were acting slowly, and perhaps unwisely, but always on the basis of unilateral corporate concerns and always in good faith.

Chessie and B&LE argue that "Litton had actual knowledge of the key operative facts underlying its present allegations,"²¹ and that "[r]egardless of its actual knowledge of the alleged conspiracy, however, the evidence shows that long before 1977, Litton had been advised of the key operative facts which form the basis of its conspiracy claims."

Chessie and B&LE first argue that Litton knew that railroads had a uniform handling charge for ore vessels for all lake ports. Even if this is true, however, this does not show that Litton knew of a conspiracy to inhibit the use of self-unloaders. As the court stated in *Pinney*, "[k]nowledge that the railroads had parallel iron ore tariffs is not the same as knowledge of the alleged conspiracy [to inhibit the use and development of self-unloaders]." Stat. Lim. Op. at 34.²²

N&W points to documents written during the time Litton was negotiating with Penn Central regarding the development of a self-unloader dock facility at Whiskey Island, arguing that "[d]uring the course of these negotiations, Litton clearly became aware of Penn Central's concern that any arrangement with Litton not disrupt the handling charge structure in place at Great Lakes ports." For example, N&W submits a June 2, 1969 memorandum by Preisser indicating he doubted Penn Central "would ever let us use Whiskey Island for a tariff of 14 [cents], or even twice that price." Preisser concluded that "the major problem lies in disrupting the dock rate structure (55 [cents]) *for other docks owned and/or operated by the Penn Central on the Great Lakes.*" The language emphasized above

²¹ Similarly, N&W maintains that "plaintiffs had sufficient knowledge of the operative facts of their cause of action to meet the *Dayco* standard."

²² Chessie and B&LE also argue that the evidence shows that by 1967, Litton knew that the railroads' handling charges were higher than necessary, based on costs, and that the railroads had been and continued to be opposed to the development of self-unloaders. Again, this does not show Litton knew the railroads were conspiring.

was omitted by N&W, and shows that Preisser's reference to the "dock rate structure" did not necessarily refer to anything more than Penn Central's own structure.²³

Defendants argue that several other documents show that plaintiffs knew the railroads were meeting and communicating about handling charges, and knew these were non-public meetings. Defendants point to a March 16, 1970 memorandum from Andberg, president of Wilson Marine, to Preisser and Manley on "ore delivery by self-unloader to commercial docks." Andberg stated that the "[r]ailroads are meeting next week to discuss rate and future position."²⁴

²³ N&W also highlights language from a report by Charles S. Wood, an engineer employed by Litton to assist with the physical design of the conveyor system. As quoted by N&W, this language would tend to support its argument that Litton knew of the railroads' collusion. However, in quoting language from Wood's report, N&W omitted key portions of the passage. The full quotation follows, with the language omitted by N&W emphasized:

The railroads are our competitors and we are fortunate in our relations with the Erie which we should protect until such time as mergers or other changes may alter this situation. The Erie is vital to our Cleveland conveyor project. If we compete hard enough and well enough we may be able to obtain concessions in the area of other railroad docks and rights-of-way. The railroads have opposed certain land acquisitions that would have eased our progress. The history of railroads in opposing belt conveyors in Ohio and other steps forward elsewhere over the years would indicate opposition rather than cooperation with some parts of our system that can be overcome by vigorous competition in fact rather than in theory.

As noted by N&W, Woods recorded that the "railroads have opposed certain land acquisitions that would have eased our progress." However, the full quotation includes the statement that "[i]f we compete hard enough and well enough we may be able to obtain concessions in the area of other railroad docks and rights-of-way." This complete quotation supports plaintiffs' argument, discussed *infra* p.36, that Litton did not know of a conspiracy to exclude it and thought Litton would be able to compete with the railroads.

²⁴ In addition, this memorandum states that "Standard Slag (Pinney Dock-Ashtabula) is prepared to go to court if necessary to establish rail rates to inland plants or self-unloader ore." Chessie and B&LE argue that this and other evidence shows that Litton knew that Penn Central "was blocking use

(footnote continues)

In his deposition, Preisser was asked whether he in any way pursued Andberg's report that the railroads were meeting "to discuss rate and future position." Preisser responded:

No, I wouldn't have, because a term like that would be nonspecific enough that I really wouldn't pursue it at this time. It was not a statement a memorandum would say to me, "A decision is going to be made. This decision has timely consequences for us. We should be prepared to make our input in thus-and-such a manner."

Preisser was next asked if as of March 1970 he had an "understanding whether it was lawful for the railroads to meet and discuss rate and future position." He answered:

My experience, as I said before, was limited to the notion that I know rate bureaus' discussion of rates, you know, went on essentially in a public fashion. They reached some kind of agreement or resolution, and then it was published in a public fashion. . . .

Similarly, in Andberg's deposition, he testified that he was not "aware of collective actions by the railroads during the time [he] was employed by Litton." However, Andberg testified that he was aware of the rate bureau meetings. Andberg explained:

I was aware that we were getting noes from individual railroads. I was not aware that they had meetings after their rate meetings and collectively got together and did this.

Andberg's deposition testimony raises a genuine issue of material fact as to whether Andberg's March 16 memorandum

(footnote continued)

of Pinney Dock by self-unloaders by refusing to establish a competitive commodity line haul rate for ore from that dock." Even if this is true, however, defendants have not produced evidence showing that Litton knew more than Pinney Dock knew, and this court has held that Pinney did not as a matter of law know the operative facts of its cause of action, based on the same alleged antitrust conspiracy. Stat. Lim. Op. at 42-43, 63.

statement establishes that Litton knew the railroads "collectively got together" apart from rate bureau meetings to plan unitary action. Further, even if Litton learned that railroad representatives had met in private in March of 1970, this does not as a matter of law reflect that Litton also knew of the February 1958, the 1961 and any later secret understandings of the railroads, the key operative facts of Litton's claim.

N&W points to two other statements made by Andberg to support its argument that Litton knew the operative facts giving rise to its cause of action. First, in a draft letter to John Howard of Bethlehem Steel (undated), Andberg referred to a statement made by Howard in a meeting: "you indicated that we could have difficulties with the railroads banding against us; that other people might cut the rates to keep us from getting business." Second, in Andberg's deposition, he testified that "it was common knowledge to me before I ever went to work for Wilson that the railroads didn't want self-unloaders delivering iron ore."

When questioned about Howard's warning of the railroads "banding against us," Andberg testified that he "didn't know really what John meant," but that he did "know that [Howard] was upset that we would change the traditional rate structure." In addition, as seen, Andberg testified he was not aware of collective actions by the railroads (apart from rate bureau actions) during the time of his employment. Thus, the evidence of Andberg's statements highlighted by N&W does not establish as a matter of law that Litton knew the operative facts giving rise to its conspiracy claim.

Defendants claim further support for their argument that Litton had knowledge from the exchange of letters between Manley of Wilson Marine and Wallace of Penn Central in early 1971 after Litton learned of Penn Central's proposed \$1.41 handling charge. *See supra* pp.20-23. As seen, Wallace informed Manley that he had sent Manley's enclosed draft letter to "key members" of the CCIOC, and upon request provided a list of those members to Manley.

In addition, Chessie and B&LE argue that in Wallace's March 19, 1971 reply, "Wallace told Litton that the self-unloader rates had been 'approved' even though the PC would

not likely publish them." This argument apparently refers to the first sentence of Wallace's reply:

This is in response to your March 2 letter attaching your proposed request to the Traffic Executives for public hearings in connection with rates *approved* for handling self-unloaders at railroad-owned docks.

(Emphasis added.) From this, Chessie and B&LE argue that "Litton should have been put on notice by this that other members of the CCIOC had already discussed PC's proposed self-unloader rates and had manifested their agreement to them."

The court previously reviewed this exchange of letters with respect to the first element of *Dayco*. See *supra* pp.20-23. The court found that although Manley identified for Wallace the railroads which had been sent Wallace's draft letter, Manley did not send Wallace a copy of Manley's "cover letter" which proposed that bulk rates should be applied until a different agreement could be reached. Thus, this evidence as a matter of law does not show that plaintiffs had knowledge of the railroads' secret understandings, one of the key operative facts forming the basis of plaintiffs' claim. Further, the court finds that the use of the word "approved" in Wallace's March 19 letter did not as a matter of law notify Litton that the railroads had secretly discussed and "manifested their agreement" to Penn Central's proposed rate.

Defendants also argue that the evidence shows that Litton knew defendants met on April 29, 1971 to discuss dock handling charges for self-unloaders. As seen, see *supra* p.13, in early 1971 plaintiffs were negotiating with C&O/B&O concerning the handling of self-unloaders at Lorain. Preisser's memorandum to file, quoted above on p.17, indicates Preisser knew on April 26, 1971 that on April 29, the day before he and Sandmann were scheduled to meet, Sandmann was planning to meet with other railroads "to discuss their terminal strategy on the Great Lakes and the relationship of that strategy to the new jumbo self-unloaders." In addition, in this same memo, Preisser recorded the following:

I made it very clear to Mr. Sandmann that I was not interested in (a) doing business with the Penn Central, or (b) having the Penn Central control our ability to do business with other railroads.

Also in the same memorandum, headed by the same date, Preisser summarized another conversation:

Ross Conlin called me and I told him of my conversation with Watkins and Hanifin last Friday. *I told him we would not like the idea of the railroads colluding and/or meeting to determine their strategy on lake transfer terminals.* He understood. He said he was going to meet with Sandmann the night before the meeting and then would call me following the meeting.

(Emphasis added.)

During their April 30 meeting, Sandmann informed Preisser that C&O/B&O would not give Litton a lower handling charge for self-unloaders. In Preisser's May 9, 1971 "weekly activity report," Preisser noted that he

[m]et with George Sandmann, Vice-President of C&O/B&O, to discuss terminal arrangements for an inland rail movement for Youngstown Sheet & Tube. Disappointing because of Sandmann's outlook, age, and ability to comprehend the opportunity. *He was intimidated by the other railroads and capitulated. He will not offer us an advantageous rate over their existing docks.*

(Emphasis added.)

In response, plaintiffs highlight the following deposition testimony of Preisser. With respect to his knowledge of the railroads' meeting on April 29, Preisser's testimony is as follows:

Q. Did you consider his report in Exhibit 19, Page 2, that he was planning to meet with the other railroads to be important information, important to Litton in your responsibilities?

A. My experience led me to believe that railroads would routinely meet and talk over numbers of matters, and the mere fact that railroads met was not unusual in my mind; not then or today.

Q. Included in those matters would be rates?

A. Well, I was aware that there were, you know, ratemaking bureaus and rate filings which were published; and I presumed if they were having a meeting and they were going to discuss rates, they would do so in, you know, the proper form, whether it was at rate bureau meetings or public filing of a rate change or decision. I just presumed those would all go on in the normal course of business following normal practices.

When questioned about the statement in his May 9 weekly activity report that Sandmann was "intimidated by the other railroads and capitulated," Preisser testified as follows:

Q. Did you draw a conclusion that that meeting had occurred from his conversation with you in which you concluded that he was intimidated by the other railroads and capitulated?

A. I don't recall, and I didn't read that sentence to state that he was intimidated at a meeting with the other railroads by the other railroads, and I think if I had intended to mean that, I would have tried to phrase the sentence in that manner.

Q. Did you connect up the intimidation with your knowledge that Mr. Sandmann, as you dictated in the memorandum of April 26th, Exhibit 19, "is planning to meet with other railroads to discuss terminal strategy on the Great Lakes and the relationship of that strategy to the new jumbo self-unloaders?"

[Objection to form of question.]

A. As I said earlier, we talked about terminal strategy. Again, I tended to think in operating

straight economic terms, and when I talked about intimidation, I talked about Mr. Sandmann looking at what he might do on the Lorain dock; and then having made such a decision, he may have been intimidated by the other railroads' financial power, their responsiveness, their engineering, their car fleet size, the rapidity with which they could move and update their docks, arrangements which they might proceed to enter into with American Ship Building or some other Lake transportation carrier.

The evidence summarized immediately above would permit the trier of fact, as defendants argue, to find that plaintiffs not only knew the railroads privately met and communicated, but also that plaintiffs knew the meetings and communications resulted in joint action which hindered Litton's efforts to develop its self-unloader business.

Nevertheless, plaintiffs have submitted evidence which raises a genuine issue of fact as to whether plaintiffs knew the operative facts underlying its antitrust claim. Even if plaintiffs knew that defendants met privately on April 29, this is not as a matter of law the equivalent of plaintiffs having knowledge that defendants had previously entered into and were furthering their alleged conspiracy to restrain the use and development of self-unloaders. Further, it may be found, as Preisser testified, that when he stated Sandmann was "intimidated" by the April 29 meeting, Preisser was referring to natural economic pressures rather than pressure resulting from a conspiracy involving handling charges. As the court noted in *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), "'suspicion will not substitute for knowledge of facts from which [an antitrust conspiracy] could reasonably be inferred' [quoting *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973)]." See also *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1170-71 (5th Cir. 1979).

After April 1971, C&O/B&O and Litton continued to negotiate about the possible leasing of the Fairport dock to Litton. As seen, when Penn Central learned of this possible leasing, Moore of Penn Central sent a letter on May 6, 1971 to

C&O/B&O expressing his opposition. Defendants contend that Litton was aware of this letter and of how Penn Central said it would respond to any reduction in rates, since a memorandum from Andberg to Preisser of May 27, 1971 reported that

Wallace has prepared a letter for Moore's signature stating that PC will reduce rail rate to equalize any reduction in dock handling charges by others.²⁵

In response to defendants' arguments concerning Litton's awareness in 1971 that Penn Central would meet any reduction by C&O/B&O in dock handling charges, plaintiffs argue that this only means that "Litton thought—incorrectly as it turned out—that the railroads were willing to compete with each other." In support, plaintiffs note the following deposition testimony of Preisser:

Q. . . . What did you understand Andberg to mean in stating, "PC will reduce rail rate to equalize any reduction in dock handling charges by others?"

[Objection to form of question.]

A. Well, I would have taken that to mean then, you know, as I do now after taking a look at it, that the PC was going to be competitive.

BY MR. POLLAK: (Resuming)

Q. Meaning it would meet any rate reduction which appeared in the tariff by another railroad setting dock handling charges?

A. I would have taken that at that time as good news; that it says that Penn Central is determined to be competitive. George Wallace has sold the company on being competitive, and that they were prepared to compete.

Q. By doing what?

A. By adjusting rail charges or whatever was necessary to be competitive.

²⁵ Similarly, a later Andberg memorandum summarizing a conversation with P. L. Tietjen of Jones & Laughlin that "[i]f B&O reduced dock charge, Wallace of Penn Central would equalize."

Q. By that you mean to meet reductions by any other railroad?

A. Or any other combinations of docks and railroads that may, you know, attract the basic core of their business.²⁶

The trier of fact may believe that Litton knew about Penn Central's threats to "equalize any reduction in dock handling charges by others" and that this constituted collusion. However, it may also be found that Litton saw this as a sign of competition and not collusion, as Preisser testified. Thus, plaintiffs have submitted evidence which raises a genuine issue of fact as to Litton's knowledge of the operative facts of its claim.

Based on all the evidence viewed most favorably for plaintiffs, it is concluded that defendants have not as a matter of law "clearly established" that plaintiffs knew the operative facts forming the basis of its claim. Rather, it is determined there exists a genuine issue of fact with respect to *Dayco's* second element.

C.

Under the third element of *Dayco*, plaintiffs must ultimately prove Litton acted with "due diligence until discovery of the facts." *Dayco*, 523 F.2d at 394. In discussing this requirement, the *Dayco* court stated:

The Supreme Court case of *Wood v. Carpenter* [101 U.S. 135 (1879)] long ago established the

²⁶ Preisser's answer continues:

Mr. Andberg and Mr. Manley were very sensitive to those things which might have a stultifying effect on their abilities to sell boats or to gain iron ore traffic. We saw in previous exhibits how excitedly they reacted even at the suggestion that a tariff could be interpreted to include disadvantageous features on the self-unloader.

If Mr. Andberg had seen this potential letter as anything other than maintaining competitiveness, he would have been quite vivid in this memorandum about it. He saw it as good news, and I would have read it as good news.

standards for pleading fraudulent concealment. The Court said that an injured party has positive duty to use diligence in discovering his cause of action within the limitations period. Any fact that should excite his suspicion is the same as actual knowledge of his entire claim. Indeed, "the means of knowledge are the same thing in effect as knowledge itself." 101 U.S. at 143.

Dayco, 523 F.2d at 394. For this motion, however, defendants have the burden of demonstrating "conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing [this] suit." *In re Beef Industry Antitrust Litigation*, 600 F.2d at 1171.

Plaintiffs' complaint alleges that "Litton could not by due diligence have discovered the aforesaid violations of law by defendants and their coconspirators until evidence of the violations became known in mid-1980 as a result of a settlement of a potential lawsuit between Consolidated Rail Corporation and Pinney Dock Transport Company." In their brief, plaintiffs admit that "Litton did not consider consulting antitrust counsel" until late 1980. Nevertheless, plaintiffs argue that defendants "actively concealed" the alleged conspiracy, and that "in light of such acts . . . Litton acted with reasonable diligence."

Plaintiffs state that in *Campbell v. Upjohn Co.*, 676 F.2d 1122 (6th Cir. 1982), the court ruled "that the requirements of *Dayco* are met by '[a]ctions such as would deceive a reasonably diligent plaintiff . . .'" also emphasize the following language in *Campbell*: "Active concealment by the defendant will be considered in determining the reasonableness of the behavior of the plaintiff under the circumstances." *Id.*

In *Campbell*, the plaintiff alleged that he was fraudulently induced to sign a merger agreement and that the terms of the agreement were fraudulently concealed from him.²⁷ The dis-

²⁷ Specifically, *Campbell*

allege[d] that Upjohn had procured his signature on a merger agreement fraudulently by promising a back end payment, and

(footnote continues)

strict court held that the plaintiff did not meet the due diligence requirement for fraudulent concealment, and therefore the statute of limitations was not tolled.²⁸ In upholding the district court, the Sixth Circuit noted that the "plaintiff's ignorance of his cause of action does not by itself satisfy the requirements of due diligence and will not toll the statute of limitations." *Id.* at 1127.

The appellate court later addressed appellant's argument that the due diligence standard did not apply to cases of "active" concealment, where "defendant has engaged in affirmative acts of concealment beyond the original fraud itself." *Id.* at 1127. Although questioning whether the alleged "active" concealment was concealment at all, the court stated:

Even assuming that the oral assurances in the present case amount to "active concealment," this court joins those circuits which have declined to formulate a separate rule for cases involving active

(footnote continued)

that Upjohn had fraudulently concealed from him the terms of the merger agreement by making oral assertions after the signing that his payment would be forthcoming.

Campbell, 676 F.2d at 1125.

²⁸ As summarized by the appellate court, the district court held that *Campbell* should have learned of the fraudulent scheme by October 1973 in view of the following:

(1) he had in his possession the merger agreement; (2) he had retained counsel in 1971; (3) he was aware of the second letter of intent and the subsequent negotiations; (4) according to his own averments, Upjohn officials already had mistreated him and dashed his expectations by forcing him to resign; (5) by 1971 he had extracted his last share of Upjohn stock from an escrow account and he no longer retained any shares of Homemakers or of the successor corporation; and (6) therefore, there could be no basis for the exchange upon which the back end payment was to be predicated. We agree with the district court and hold that, as a matter of law, these facts should have apprised a diligent plaintiff of his cause of action within the limitations period and that his inaction in the face of these facts does not warrant tolling the statute of limitations.

Campbell, 676 F.2d at 117.

concealment by the defendant. . . . alleged additional acts of concealment by the defendant beyond the original fraud did not exempt the plaintiff from the requirement of diligence in pleading the federal equitable tolling doctrine of fraudulent concealment.

Id. at 1128 (citations omitted). However, the court explained that the due diligence requirement would “work no injustice” in cases of active concealment:

Active concealment by the defendant will be considered in determining the reasonableness of the behavior of the plaintiff under the circumstances. Actions such as would deceive a reasonably diligent plaintiff will toll the statute; *but those plaintiffs who delay unreasonably in investigating circumstances that should put them on notice will be foreclosed from filing, once the statute has run.*

Id. (emphasis added).

In their argument, plaintiffs quote the first portion of the above quotation, but not the emphasized part. Thus, to cite *Campbell* for the proposition “that the requirements of *Dayco* are met by ‘[a]ctions such as would deceive a reasonably diligent plaintiff,’” is neither complete nor accurate. Rather, the *Dayco* requirements *may be met* by such actions. Under *Campbell*, “active concealment” will be considered in determining whether a plaintiff was “reasonably diligent,” but it does not automatically establish the requirements of *Dayco*. To meet those requirements, the plaintiff must still show that the plaintiff did not “delay unreasonably in investigating circumstances that should put them on notice.”

Plaintiffs allege that defendants’ “active concealment” took the form of secret meetings and communications, misleading negotiations, and Penn Central’s misrepresentations in communicating with Litton concerning its proposed handling charge and in later withdrawing that charge. In part I.A., the court found that a genuine issue of material fact exists as to whether defendant wrongfully concealed the alleged conspiracy. The

court concluded that there was evidence which raised a question of fact as to whether Litton was purposely misled by continuing negotiations with C&O/B&O, see *supra* p. 19, and Penn Central's representations that it was willing to do business with Litton, see *supra* p. 25. Thus, there may have been "active concealment" here.

However, these alleged acts of "active concealment" are not necessarily enough to show Litton's due diligence. If, for example, Litton at some point acquired knowledge of facts which should have "excite[d] its suspicion" and it did not investigate, then plaintiffs may not have acted with reasonable diligence, despite any "active concealment."

Defendants argue that plaintiffs did have knowledge of facts which should have aroused its suspicions. Chessie and B&LE contend:

Defendants submit that the evidence shows that Litton had actually become concerned that the railroads were "colluding . . . to determine their strategy on lake transfer terminals," Enclosure F., *supra*, and that C&O/B&O had been "intimidated by the other railroads." Enclosure G, *supra*. In short, the undisputed evidence shows that Litton, if it did not have actual knowledge of the operative facts underlying its conspiracy allegations, had far more than enough information to excite its suspicion as to those facts.²⁹

²⁹ Similarly, N&W argues:

Litton believed, as early as 1971, that the railroads were "colluding" in determining lake terminal strategy in regard to self-unloaders and that the C&O/B&O "capitulated" after being "intimidated" at the April 29 meeting of the railroads held to discuss that strategy. Such beliefs are patently inconsistent with plaintiffs' present contention that they were lulled into not bringing the present action until 1981, in the belief that the railroads were attempting to reach a working arrangement with it. Indeed, in their answer to Interrogatory 17, plaintiffs indicated that there were no communications between plaintiffs and defendants subsequent to July 1972.

Plaintiffs do not dispute the evidence Chessie and B&LE submit as "Enclosure F," Preisser's memo to file dated April 23, 1971 (page two is dated April 26, 1971). As previously described, in this memo Preisser records that Sandmann had called to arrange a meeting on April 30 and that on April 29 "he is planning to meet with other railroads to discuss their terminal strategy." Two other statements from page two of this memo are important and bear repeating:

I made it very clear to Mr. Sandmann that I was not interested in (a) doing business with the Penn Central, or (b) *having the Penn Central control our ability to do business with other railroads.*

Ross Conlin called me and I told him of my conversation with Watkins and Hanifin last Friday. *I told him we would not like the idea of the railroads colluding and/or meeting to determine their strategy in like transfer terminals.* He understood. He said he was going to meet with Sandmann the night before the meeting and then would call me following the meeting.

Both Conlin and Schroeder are essentially supporters of our plan. It is evident Conlin believes we are better off moving in through Lorain due to the empty coal cars returning southbound. He feels that Fairport (although a cheaper haul) requires car purchases and expenditures at the port. He was most agreeable in general and I expect he will continue to be. He understands as much about our problems as anyone at the C&O/B&O.

(Emphasis added.) The evidence indicates that one day after the railroads' April 29 meeting, Sandmann told Preisser that C&O/B&O would not offer Litton an "advantageous rate." Preisser's Weekly Activity Report (Chessie and B&LE's "Enclosure G") notes with respect to that conversation: "He was intimidated by the other railroads and capitulated."

The evidence does not show that Litton had any knowledge of facts which should have excited its suspicion before

May of 1971. However, by May of 1971, the undisputed evidence shows that Litton had knowledge of the following. First, Litton knew that C&O/B&O was seriously considering providing Litton an "advantageous rate over their existing docks" and that at least some C&O/B&O officials, *i.e.*, Conlin and Schroeder, favored granting Litton this rate. Further, Litton knew that the day before Sandmann informed Preisser that C&O/B&O would not grant this favorable rate, Sandmann met with the other railroads to "discuss their terminal strategy in the Great Lakes and the relationship of that strategy to the new jumbo self-unloaders." Finally, Litton also knew that one day later it was informed C&O/B&O would not grant Litton a favorable rate.

Standing alone it might be found that knowledge of these facts should have excited Litton's suspicions of the alleged conspiracy. However, Litton has produced evidence of continued negotiations and communications which may have reasonably deterred Litton from investigating any suspicions that did arise or should have arisen by May 1971.

As seen, *supra* note 18, on April 30, 1971, Sandmann notified president Watkins of C&O/B&O that Preisser was "to consider further the Grove storage area," and he had been "able to reactivate [Preisser's] interest in Fairport provided we can find some arrangement to make him whole on the 10 [cents] differential." Further, in his letter to Andberg of July 14, 1972, Sandmann spoke of Wilson Marine's "renewed interest in leasing our ore unloading facilities at Lorain, Ohio." In addition, this same letter indicated that a more advantageous rate was possible, despite Sandmann's statement of April 30, 1971 to Preisser that C&O/B&O would not offer Litton a rate "below the figure of 65 [cents] per ton in accepting Litton's vessels at Lorain Dock." Sandmann informed Andberg "we have announced and are proceeding with immediate publication of an aggregate charge for handling iron ore from self-unloaders at 55 [cents] per net ton . . . effective August 16, 1972." Finally, Sandmann kept open the possibility of leasing the Lorain dock to Litton. He wrote:

We have embarked upon a rather elaborate inter-departmental study of the future of all of our lake

docks, both at Lorain and at Toledo; and until this study is completed and some conclusions are drawn therefrom, we will not be able to progress your application to lease the Lorain facilities.

The record shows that Litton did not consult counsel or take any other action to investigate a potential antitrust conspiracy claim until late 1980. However, the evidence of continued negotiation and communication between plaintiffs and defendants from May 1971 through mid-1972 may have reasonably deterred Litton, either on its own or through counsel, from investigating any possible claim. Therefore, the court cannot find as a matter of law that Litton's failure to investigate was unreasonable during this period.

The court next considers Litton's failure to investigate after 1972, when negotiations had ceased and Litton terminated its efforts to compete in the Great Lakes shipping industry.

Plaintiffs acknowledge that Litton sold its Wilson Marine fleet to American Shipbuilding in 1972 and in the same year, sold Marine Consultants and Designers. Further, plaintiffs state that "[i]n 1974 Litton shut down its Erie Marine shipbuilding facility, though the facility continues to be used as a dry dock" and that Litton still operates "Hull 102," which is chartered to United States Steel Corporation. As defendants Chessie and B&LE point out, on page 46 of plaintiffs' memorandum in opposition to Penn Central's motion to dismiss, plaintiffs admit that "[h]aving failed in over six years of continuous efforts to develop a dock facility somewhere on Lake Erie, Litton abandoned its efforts in mid-1972."

The record does not reveal any events after mid-1972 that would have exacerbated the suspicion Litton did or should have had by May 1971. Indeed, the withdrawal of Litton from Great Lakes ore handling, shipping and Great Lakes shipbuilding would have abated Litton's interest in pursuing an investigation into any suspicion it might have had that the railroads were "colluding" on rate matters. Thus, whether Litton's failure to investigate both before and after 1972 was reasonable under the circumstances is a question for the trier of fact. *See Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 698 (9th Cir. 1977).

In addition, on the present record, there is no indication that investigation by Litton would have uncovered the conspiracy. Any suspicion that Litton may have had that the defendants were colluding did not constitute grounds for filing a suit alleging an antitrust conspiracy. Further, defendants have not shown what steps Litton might have taken to either allay any suspicions or confirm them.

Moreover, adopting a conclusion reached in *Pinney*, Litton could not be expected as a matter of law to have filed an antitrust action merely to obtain "broad-based discovery." Rule 11 of the Federal Rules of Civil Procedure demands "good ground[s]" for the filing of any pleading in federal court. Absent actual knowledge or a factually well-founded suspicion of illegal concerted action, Litton would not have had "good grounds" for filing an antitrust suit alleging a conspiracy among defendants to eliminate the competition of private ore docks.

Thus, the instant case is unlike *Campbell*, 676 F.2d 1122, in which the Sixth Circuit upheld the district court's ruling that plaintiff did not exercise due diligence because he could have discovered his cause of action simply by reading the merger agreement which he signed and had in his possession. Here, the evidence raises a question of material fact as to whether the means for discovering plaintiffs' cause of action were reasonably ascertainable. The instant case is also unlike *In re Beef*, 600 F.2d 1148, where another party had actually filed suit against defendants. Nevertheless, the *In re Beef* court ruled that "the mere filing of a similar lawsuit, without more, does not necessarily give 'good ground' because that suit might well be frivolous or baseless." *Id.* at 1171. Here, there was no suit filed by any other party until 1980.

Since defendants are the moving parties at this summary judgment stage, as stated by the court in *In re Beef*, defendants have the burden of "demonstrat[ing] conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit." *Id.* Defendants have not conclusively demonstrated this.

Considering the evidence most favorably for the plaintiffs, it is concluded that there is a genuine issue of fact as to whether the third element, "due diligence until discovery of the facts," is satisfied.

In sum, the court determines that on the present record there is a genuine issue of material fact as to whether there was fraudulent concealment of the alleged conspiracy. Therefore, the summary judgment motions of the defendants, based on the statute of limitations under section 4b of the Clayton Act, are overruled.³⁰

II.

In addition to arguing that plaintiffs have not sufficiently alleged or shown fraudulent concealment, N&W maintains that plaintiffs' failure on the Great Lakes did not result from any action taken by defendants either jointly or

³⁰ N&W also argues that "even if one of the defendants made misstatements of fact which, properly pled, could constitute fraudulent concealment or inducement, the statute of limitations would not be tolled as to N&W." In addressing the same argument made by N&W, Chessie and B&LE in *Pinney*, this court stated:

[A]ny defendant who is ultimately found to have knowingly participated in the alleged antitrust conspiracy cannot contend that there was no wrongful concealment if the conspiracy was carried out in a manner which precluded detection. Furthermore, if plaintiff can show that misrepresentations were made by one conspirator during the course of and in furtherance of the conspiracy, then any coconspirators must also bear responsibility for those misrepresentations. *In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1151-52 (7th Cir. 1981), affirmed on other grounds, *Pillsbury Co. v. Conboy*, U.S. _____ 103 S.Ct. 608 (1983). See also Fed.R.Evid. § 801(d)(2)(e).

Stat. Lim. Op. at 31-32 (footnote 15 omitted). (In note 15 of the *Pinney* opinion, the court distinguished two cases cited by N&W, *Cato v. International Longshoremen's Ass'n*, 364 F.Supp. 489, 493 (S.D. Tex.), *aff'd, per curiam*, 485 F.2d 583 (5th Cir. 1973), and *Greenfield v. Kanwit*, 87 F.R.D. 129 (S.D.N.Y. 1980).) Thus, the statute of limitations does not run only as to N&W if N&W is found to have knowingly participated in the conspiracy and if it is found that the conspiracy was fraudulently concealed.

individually. Plaintiffs' failure, as their own contemporaneous documents make clear, resulted from a host of miscalculations made by plaintiffs and circumstances over which defendants had no control.

Specifically, N&W argues that the failure of Litton's land conveyor belt scheme and its shipping and shipbuilding operations had nothing to do with defendants' conduct.

A.

The first part of N&W's argument relates to the "conveyor belt scheme," which refers to Litton's plans to establish a system to transport ore to steel mills up the Cuyahoga River by conveyor belt from an unloading and storage facility at the Cleveland dock of the Erie-Lackawanna Railroad (Erie). As described by plaintiffs,

[s]elf-unloaders built by Litton would discharge ore on to the conveyor belt, which would then either transport the ore directly to steel mills or offload it into rail cars for shipment to the mills.

Litton approached Erie with this conveyor-belt proposal for self-unloaders in 1965. Litton and Erie then reached an agreement under which Litton would use Erie's Cleveland dock for unloading and would obtain a right-of-way over Erie property, and which restrained each party from developing delivery systems with others. Subsequently, Litton learned that additionally it would need a right-of-way over N&W property in Cleveland to reach Republic Steel's plants and N&W property near the Erie dock to complete a storage area. Litton was not successful in obtaining either.

N&W argues that several internal Litton studies and memoranda show that the failure of the conveyor plan is not attributable to N&W's conduct. According to an internal Litton memorandum to J. B. Cogan from E. L. Gay, Litton was told by Republic Steel on September 6, 1966 that "Republic Steel was becoming concerned with the rate of progress which Litton had made thus far," and wanted a "concrete and detailed

proposal" by the end of the year. A September 15, 1966 report prepared for Litton by George L. Stein analyzed three alternative delivery systems for Cleveland: "small low cost river barges; shuttle trains over existing tracks; or a belt conveyor." Stein concluded:

Both barge and rail alternates to the present Cuyahoga delivery system are feasible. They satisfy both economic and marketing criteria. The conveyor alternate satisfies neither so it should be dropped or downgraded considerably.

The record includes a confidential Litton memorandum from Quinn to Gardner of November 3, 1967 (hereinafter "confidential memorandum"). It provides a summary of Litton's Great Lakes Project, including the "current status of [Litton's] marketing activities and the obstacles we must overcome if we are to take full advantage of the market potential."

Quinn's confidential memorandum includes a discussion of the status of negotiations with Jones & Laughlin Steel Corporation and Republic Steel Corporation and a description of the "ancillary agreements" to these negotiations. Quinn's confidential memorandum explains that

[b]ecause of the key role played by the Cleveland up-river delivery system in securing a long term contract of affreightment from either Republic or J&L, the first step taken by Litton was to evaluate the feasibility of a conveyor system movement of the ore.

Quinn described the Litton-Erie agreement of June 1965 and a "second agreement" with Republic Steel of October 1965. As he explained under the Republic agreement it was agreed that

Litton will conduct a feasibility study covering (1) construction and operation of "Super-Lakers," (2) unloading facilities at the Erie dock in Cleveland and at the Republic facilities located in Chicago and Buffalo, (3) a conveyor system for movement of bulk materials from the Erie dock in Cleveland to Republic's facilities there, and (4) reclaiming and blending facilities for Republic's facility in Cleveland.

Under the next heading, "feasibility of the conveyor system," Quinn described on page 23 Litton's "full-scale effort both to design a conveyor system to be utilized on the Erie RR right of way and to obtain parcels of real property contiguous thereto as necessary to accommodate the equipment for such a conveyor system." Litton then determined that a conveyor system of conventional design was too costly and that there was a further problem with "pellet degradation" from multiple transfers. Quinn reported that the conveyor system was redesigned to eliminate the transfer points, but that

[d]espite the redesign, additional problems prevent a conclusion that the conveyor system is feasible. They are: (1) Litton's inability to successfully negotiate with the Norfolk & Western Railroad Company for an essential portion of its right of way that must be utilized to reach Republic's and J&L's Cleveland facilities, (2) Litton's inability to obtain from the Norfolk & Western RR Co. property contiguous to the National Sugar property that is essential to effecting the required storage capacity in the Cleveland area, and (3) the inability of *the 1000 foot vessel to navigate the "Old River" to reach the Erie dock for unloading purposes.*³¹

(Emphasis added.)

In part B of Quinn's confidential memorandum, "Storage Facility and Unloading System," under the subheading "Cleveland Conveyor," Quinn recommended the following:

It is the writer's recommendation that the conveyor approach to delivering ore up the Cuyahoga River be

³¹ This section of Quinn memorandum also describes an alternative transport system:

In passing, an alternative method of moving ore to the J&L and Republic plants in Cleveland was formulated and determined to be feasible by the Transportation Systems Planning Group. This method consists of unloading the Litton 1000 foot vessel inside the Cleveland breakwater into self-propelled, self-unloading barges for shuttle up the Cuyahoga River.

abandoned. In addition to the reasons therefor advanced at the bottom of page 23 and top of page 24, *the writer seriously doubts that the system can operate without subsidization because of the high capital costs involved.*

(Emphasis added.)

Quinn's 1967 confidential memorandum to Gardner demonstrates that even if Litton had successfully negotiated with N&W for the use or purchase of property needed for the conveyor project, the project still would have failed for an apparently unsolvable technical reason, "the inability of the 1000 foot vessel to navigate the "Old River" to reach the Erie dock for unloading." In addition, it is clear that there were serious economic obstacles to this system "because of the high capital costs involved."³²

These conclusions are corroborated by later Litton documents written in early 1968. A February 8, 1968 memo to file of Richard K. Quinn contains notes regarding a discussion he had in a meeting with the president of Erie, Greg Maxwell. As N&W observes, this memorandum concludes with Quinn's statement that he saw "no alternative but to terminate this agreement as soon as the study of our delivery system is completed." N&W states that Quinn recommended the termination "because of the inability of the Litton supercarriers to reach E-L's Cleveland dock." Quinn did conclude, as N&W suggests, that the "inaccessibility of the Erie dock [to Litton's 1000-foot vessel] is a major obstacle to any joint venture with Erie." The memo also refers to "the right-of-way problem heretofore faced," which Maxwell said would disappear as a result of the pending merger between Erie and N&W. The merger never materialized. Erie Lackawanna filed for bankruptcy reorganization on June 26, 1972. *See In re Erie Lackawanna Railway Co.*, 519 F.2d 893, 894 (6th Cir. 1975).

³² In their opposition brief, plaintiffs did not respond to these arguments of N&W, nor have they submitted any further response since their opposition brief was filed on May 17, 1982.

In a letter to Erie's Maxwell, dictated by Quinn and signed by Litton chairman Glen McDaniel, Litton followed Quinn's recommendation and terminated the Erie agreement as of April 1, 1968. McDaniel's letter refers to the "various problems" encountered in implementing the Litton-Erie agreement "including the economics of boat size and the inability of economically sound vessels to navigate that part of the Cuyahoga River known as "the Old River." As noted by N&W, the McDaniel letter continues:

Moreover, we have as you know, serious reservations regarding the technical and economic feasibility of a conveyor system as a solution to the movement of bulk materials in the manner which we had originally envisaged.

Based on the entire record, the court concludes that the undersigned evidence clearly establishes as a matter of law that the failure of the conveyor system is not attributable to the actions of N&W.³³

Nor is the failure attributable to the actions of any other railroad. The only reference to a possible link between the actions of "the railroads" and the conveyor system is contained in the report by Litton engineer Charles S. Wood, discussed previously. *See supra* note 23. As seen, in discussing the "conveyor project," Wood stated: "The railroads have opposed

³³ N&W further argues that even if its alleged refusal to sell or lease land to Litton in some way contributed to the failure of Litton's conveyor system, "there is not a scintilla of evidence to suggest that N&W's alleged refusal was the result of any agreement between or among defendants . . ." and was an independent business decision. Having determined that as a matter of law the failure of the conveyor system had nothing to do with N&W's actions, the court need not pursue this additional N&W argument. However, Litton has not procured any evidence which links N&W's alleged refusal to sell or lease these parcels of land to the alleged conspiracy. Moreover, the court found in Pinney that N&W's decision in March-April 1969 not to handle self-unloaders at Huron was an independent business decision. Stat. Lim. Op. at 70-71. This Huron decision, made at about the same time negotiations over conveyor system parcels were ending, is consistent with N&W's argument that its refusal to sell or lease conveyor system land was the result of an independent business decision.

certain land acquisitions that would have eased our progress." Even if this is true, however, the court has determined that the conveyor system failed for technical and economic reasons. Thus, the court concludes that the "conveyor project" would have failed even if its progress had been "eased" by Litton's acquisition of certain land.

After Litton determined that the conveyor system should be abandoned, Litton decided to terminate its exclusive-dealing agreement with Erie-Lackawanna. In Quinn's November 3, 1967 confidential memorandum to Gardner, immediately following his recommendation that Litton abandon the "conveyor approach," Quinn stated:

It is the writer's further recommendation that the agreement with the Erie-Lackawanna Railroad Company be terminated *so as to* remove the restrictions from Litton that *prevent discussions with other railroad companies looking to a possible marriage of the water and rail movement of iron ore.*

(Emphasis added.) Quinn recorded the same conclusion in a February 8, 1968 memo to file. This same memo records that Quinn "advised Greg Maxwell, president of Erie, of the conclusion "that a water delivery system apparently provides the more logical answer to the movement of ore into the Cleveland steel mills."

One month later, on March 8, 1968, Quinn distributed a "Company Confidential" memorandum which referred to Litton's "potential joining of forces with the Penn Central Railroad Company to effect as large a capture of the ore movement as possible" ³⁴ Then, on April 1, 1968, as seen, the agreement with Erie was finally terminated.

Thus, the undisputed evidence shows that when Litton decided to abandon the conveyor plan, it decided con-

³⁴ In this memorandum, Quinn designated the project with the code name "Overlord." This code name was to be used on any written communication or document which "in no event shall refer to the designated railroad involved."

comitantly to terminate its agreement with Erie to enable it to pursue water and rail delivery systems with other railroads. At the same time, Litton began planning to join with Penn Central to develop such a system. The court concludes that these decisions would have been made regardless of the outcome of Litton's negotiations with N&W to complete the conveyor right of way to Republic Steel's mill. Based on the undisputed evidence, the court therefore finds as a matter of law that the failure of the conveyor plan is not attributable to the actions of defendants.

B.

N&W argues that the failure of Litton's shipping and shipbuilding operations was also not attributable to the alleged conduct of defendants.

As background, Litton acquired Wilson Marine Transit Company (hereinafter Wilson Marine) in 1966.³⁵ An internal Litton memorandum of May 11, 1966 recommended the acquisition of "the Wilson Fleet," consisting of ten lake bulkers and one barge. The memorandum stated that the "acquisition of the Wilson Fleet is not viewed as an end in itself but rather as an integral part of the planning of the Great Lakes project." The memorandum also identified three steel companies, Shenango, Inc., Jones and Laughlin Steel Corporation and Republic Steel Corporation, as "the prime customer targets of the Great Lakes project."

At the time of the acquisition, Wilson marine had two contracts with Republic Steel which were originally executed in 1954 and which expired in 1971. Under Wilson's haulage contract, it moved Republic iron ore from upper Great Lakes mines to Great Lakes ports. Under a second contract with

³⁵ Litton's interrogatory answers list 1966 as the year of acquisition. However, Ernest J. Andberg, who joined Wilson Marine in 1971 or 1972, stated that Litton acquired Wilson Marine "[a]pproximately sometime in 1967." Despite his 1967 date, Litton's interrogatory answer of a 1966 acquisition date is accepted.

Republic, Wilson Marine managed and operated nine ore vessels owned by Republic Steel. Wilson Marine also had ore and coal haulage contracts with Jones & Laughlin Steel Corporation and Shenango, Inc. The J&L contract terminated with the 1967 season, but Wilson Marine had agreed it would obtain a new J&L contract for 1968 and 1969 prior to the closing dates of the acquisition.

There is evidence that suggests that Litton's Wilson Marine shipping operations and Erie Marine shipbuilding operations were interdependent. For example, Litton's president Gardner in his October 30, 1968 memorandum to E. L. Ash, declared:

Considering, on the other hand, that Erie Marine's long-range plan is based on sales of \$107,118,000 through FY 72 and that neither U.S. Steel nor Bethlehem show any inclination to buy more boats until their present commitments of one each are actually put through a season, it is incumbent on us either to obtain a freight contract from Republic, J&L, Ford, and/or National, thereby permitting the building of boats for ourselves, or finding other uses for the Erie facility until Bethlehem or U.S. Steel is ready to reorder.

Thus, Litton stressed the interconnection between Wilson Marine's successfully negotiating iron ore haulage contracts with the steel companies and Erie Marine's shipbuilding operations.

N&W contends that Litton's lack of success in renewing contracts with Republic Steel and Jones & Laughlin Steel Company was not attributable to defendants' actions. N&W concentrates on the history of Litton's failed negotiations with Republic Steel. Litton made five different proposals to Republic from November 13, 1968 to February 19, 1970. These proposals, reviewed in a status report of February 25, 1970 prepared by Wilson Marine's Preisser and Struve (hereinafter Preisser-Struve report), were all predicated upon the use of two Litton 1,000-foot self-unloading vessels.

The Preisser-Struve report includes Republic's reactions, as paraphrased by the authors, to the several proposals. N&W

points to the recorded reactions of Republic that emphasized operational cost differences between the old ore boats and Litton's planned 1,000 foot self-unloaders. For example, in response to "Wilson Proposal #3," dated May 23, 1969, Republic stated, "this is still too costly. Big new boats cannot compete with old boats. You are 20-30 million more expensive than Cleveland Cliffs." Even though Litton had substantially reduced the cost in the fifth proposal, Republic still concluded:

Litton has done an amazing job in bringing the price of new equipment down . . . However when we analyzed the "total economic package" we felt that the competitor, CCI has offered a more attractive package to Republic.³⁶

Republic noted that "Steinbrenner," one of the other bidders, did not propose new ships and interpreted this "again as evidence that new big boats cannot compete with fully paid-for boats." Republic also was troubled because "the Litton system suffers from the problem of unreliability of new equipment [the unconstructed 1,000-foot self-unloaders]."

These portions of the Preisser-Struve report, considered alone, suggest that Republic's decision was based on economic criteria unrelated to the railroads. Other portions of the report, however, indicate otherwise. The authors of the report declared that two major facts now seem clear:

- (1) The decision by Republic to award transportation to Cleveland Cliffs probably involved considerations other than pure transportation.

³⁶ N&W relies on Andberg's written statement of April 8, 1982 that Litton's "credibility" suffered "complete destruction" as exemplified by "[t]he three long-term contract proposals presented to Republic Steel. From ridiculously high to incredibly low." Nonetheless, in his deposition testimony, Andberg indicated that the railroads had hurt Litton. He was asked, "You mean to tell me that nothing the railroads did hurt the Great Lakes project economically now?" He answered, "Of course it did, for Christ sake. Oh, excuse me. It hurt tremendously, but it made it more difficult to do the job and we never got it done. . . ."

(2) Republic may very well have used us over the last year merely as a tool to achieve a competitive price from Cliffs.

With respect to the first matter, all logic points in that direction. Litton is an outsider. It owns no ore mines. It has no joint ventures in pelletizing plants. It owns and controls no railroads. It, in short, is not a Great Lakes or iron-and-steel-oriented company. It cannot, to any degree, offer the same types of packages directly or indirectly to the steel companies.

One of the "packages" that Wilson Marine ultimately was unable to offer was the system proposed in the first and second proposals. These proposals centered on the use and development of Whiskey Island in Cleveland's harbor as a terminal and storage area for the self-unloaded ore. From the storage area, self-propelling barges could have been loaded for transshipment of iron ore pellets upriver to Republic (and J&L) plants, and Penn Central could have shipped iron ore by rail from Whiskey Island facility to inland plants of Republic.

The Preisser-Struve report notes the following "qualifications" to the first proposal of November 1968:

No Litton-Penn Central agreement was in effect concerning the use of the Whiskey Island property.

The charge for upriver delivery and loading into Penn Central rail cars was not yet determined.

The second proposal of February 1969 was the same as the first, except that it removed "the 600,000 GT storage capability, cutting back Whiskey Island into nothing more than a "surge" facility." The report paraphrases Republic's reaction:

Our cost objections remain essentially the same as for Proposal #1. *Also, without a firm agreement from the Penn Central, this scheme is still just a scheme and lacks operational certainty. We can't tie our ore transportation to something that is only a concept.*

(Emphasis added.) The report notes that by the time of the third proposal in May 1969,

[w]e admitted we could not reach an agreement with Penn Central regarding the Whiskey Island property. Actually the Penn Central never came lower than a 50 [cent]/GT charge for each ton passing through Whiskey Island—an undesirable burden to our system.

The Preisser-Struve report shows that proposals No. 1 and No. 2 failed in part because, as Republic put it, “without a firm agreement from the Penn Central,” the project was “still just a scheme and lacks operational certainty,” and Republic could not “tie [its] ore transportation to something that is only a concept.” Thus, there exists a genuine issue of material fact as to whether Litton’s failure in reaching agreement with Republic on proposals one and two were at least in part attributable to the actions of Penn Central relating to the Whiskey Island negotiations. There is also evidence, reviewed in the *Pinney* statute of limitations order, Stat. Lim. Op. at 22-28, as well as previously in this order, *see supra* pp. 16 and 25, that sufficiently links Penn Central’s actions to the alleged conspiracy.³⁷

³⁷ For example, in early 1971, Penn Central vocally opposed C&O/B&O’s proposed reduction in handling charges and its leasing of any lake property to Litton. Similarly, the letter from Moore (Penn Central) to Watkins (C&O/B&O) of May 6, 1971, *see supra* note 19, includes the following comments on C&O/B&O’s plans to lease its Fairport, Ohio dock facilities to Litton:

Most important of all, is the inherent dangers of including a separate commercial interest in the rail-lake-rail sequence. . . . Historically, the lower lake rail carriers have held ex-lake ore to their own facilities or to specific situations where any inland movement of ore is performed under similar rate structures and the results give little reason to question the wisdom of that policy.

There are many other facets of the Fairport proposal which are disturbing, including the possibility of trucking ore from a private facility, expansion to include other commodities, the

(footnote continues)

Because Penn Central and Litton could not reach agreement as to Whiskey Island, Litton turned to a different delivery system in proposals Nos. 3, 4 and 5. As the February 25, 1970 report explains, Litton "claimed" that it had made a "break-through in materials handling that would permit the use of the dumb [not self-propelling] barges to transport ore directly to upriver points," eliminating the need for a "land-based surge facility [such as that planned for Whiskey Island]." In the fifth and final Republic proposal, "movement of ore from Silver Bay and Escanaba to Cleveland Harbor would have been in new Litton vessels," and then "the ore would have been transloaded into dumb barges for upriver delivery."

However, Republic expressed concern for the viability of the alternate delivery system of transshipping from the 1,000 foot Litton self-unloaders to dumb barges for the trip upriver. Republic particularized their objections as follows:

(1) We have no doubt that dumb barges can be loaded from an LSC in the Cleveland harbor. You may, however, run into some problems particularly with respect to pollution that would hinder your performance, cost you time and cost you money. We would be afraid that you would then seek additional compensation from Republic to cure these defects. Thus Republic would be in the position of having to pay more than it had originally anticipated.

(2) We are not sure that the APU units which you have proposed to move the dumb barges upriver will operate satisfactorily.

From this, the trier of fact may infer that while Republic had concerns about transshipping its ore pellets from an LSC in the

(footnote continued)

effect on the Eastern lines revenue needs position through a wholesale reduction in iron ore handling charges, the proliferation of private facilities on the lakes for ore, coal, stone, etc. All in all, a considerable series of risks for a concession on a relatively small volume of tonnage which is available to you at the standard charge.

Cleveland harbor, it would have agreed to transshipment from the Penn Central Whiskey Island facility. Moreover, had Litton been able to renew a 20 to 23 year Republic transportation agreement, Litton may have proceeded with construction of the two LSC's needed to haul Republic's ore. Extending the argument further, the building of these two LSC's may have permitted Erie Marine to remain in business.

Examining all five Republic proposals, the court concludes that there is evidence which suggests that the life of the Great Lakes project depended upon renewal of Wilson Marine's transportation agreement with Republic, and that agreement could not be consummated unless Litton first accomplished an agreement with Penn Central for the development of Whiskey Island as an iron ore terminal and storage area. In turn, there is a genuine issue of material fact as to whether the failure of the Whiskey Island negotiations was part of the alleged conspiracy.

Based on the record, the court cannot conclude as a matter of law that the failure of Litton in shipping and shipbuilding was not attributable to alleged actions of the defendants.

The conclusion reached above is not altered by documents filed by Litton in *Bethlehem Steel Corp. v. Litton Industries*, No. 3388 (Pa. Ct. C.P. 1979), *aff'd*, 468 A.2d 748 (Pa. Super. Ct. 1983). This litigation arose when Bethlehem Steel, which had previously contracted with Litton for the construction of one self-unloader (Hull 101), unsuccessfully tried to enforce an alleged option agreement for the construction of three more self-unloaders.³⁸

Bethlehem Steel involved questions of contract law which are not relevant here, but the related evidence concerning negotiations and communications between Bethlehem and Litton may be relevant. For example, the Pennsylvania Superior Court's factual summary of the evidence, when "viewed in the

³⁸ After a lengthy non-jury trial on June 6, 1979, Judge Louik issued an adjudication which found in favor of Litton on Bethlehem's claim. Since then, Judge Louik's decision has been affirmed by the Superior Court, 468 A.2d 748, and is being appealed to the Pennsylvania Supreme Court. Oral argument before the Supreme Court was scheduled for September 13, 1984.

light most favorable to the victorious party below [Litton],” contains the following summary of events between 1968, after construction began on Hull 101, and 1973:

Litton attracted no other customers in its Erie [Marine] shipyard. Indeed, by early 1973, Litton officials warned Bethlehem that the Erie yard would be closed unless Bethlehem ordered additional ships. Bethlehem officials had previously stated, however, that they were “disgusted” by the “slow” construction of Hull 101, and by 1973, rather than express any objection to the closing of the Erie yard, repeatedly insisted that they would never order any additional ships from Litton. Thus, without any hope of future business from Bethlehem, Litton “mothballed” its Erie yard.

Bethlehem Steel, 468 A.2d at 754. In late 1973, Bethlehem informed Litton that it was planning to “exercise its options,” based on two letters that were exchanged in 1968. At subsequent meetings,

Litton advised Bethlehem that although it had closed down its shipyard in reliance upon Bethlehem’s representations, it was willing to build vessels if the parties could reach agreement on a ship construction contract (Ad-9), which Litton was at all times willing to negotiate. The parties, however, never agreed on any of the material terms left open in [the two 1968 letters]. . . .

Id.

The preliminary pretrial statement of Litton and Erie Marine, attached by N&W, contains a statement of the case which is quite similar to the court’s summary. For example, Litton and Erie Marine stated:

Though Erie literally begged Bethlehem for orders for additional vessels to keep the Erie yard in operation, Bethlehem was so thoroughly dissatisfied with Erie’s performance that representatives of Bethlehem repeatedly told representatives of Erie,

from late 1969 to the delivery of Hull 101 in May of 1972, that Bethlehem would never purchase another vessel from Erie even if the need arose for additional vessels. . . .

Based on these and other Litton and Erie Marine statements, N&W argues that "[t]he pleadings and memoranda filed by Litton in that case graphically recount the failure of Litton's shipbuilding efforts and demonstrate that defendants in the instant action had nothing to do with Litton's decision to cease its shipbuilding business." N&W's argument implies that N&W is contending these statements, made in another action, would be admissible as evidence.

The court determines that these statements by counsel for Litton and Erie Marine, clearly made in the course and scope of employment, would be admissible under Rule 801(d)(2) of the Federal Rules of Evidence. *See Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981); *Dixie Sand & Gravel Corp. v. Holland*, 255 F.2d 304, 310-11 (6th Cir. 1958). However, although these statements are admissible as admissions, they are not judicial admissions in this case and, therefore, are not binding or conclusive. *Id.* As stated by the Sixth Circuit court in *Dixie Sand*, "[a]llegations in pleadings in other actions are admissible in evidence as admissions, but are not conclusive, and should be considered in connection with other evidence which may be offered in explanation." *Dixie Sand*, 255 F.2d at 310 (citations omitted).

The court finds that these statements by Litton and Erie Marine in *Bethlehem Steel* do not clearly establish as a matter of law that Litton's failure in shipbuilding was unrelated to defendants' alleged actions. *Cf. Enquip*, 655 F.2d at 118 (courts must be "careful to allow opposing party a full opportunity to explain the purported admission to demonstrate that there is an issue of material fact"). Litton was unsuccessful in securing orders to build ships from anyone, not merely in obtaining further orders from Bethlehem Steel. Further, evidence reviewed above suggests that if it had been able to renew the Republic transportation contract, Litton may have built additional ships on its own or may have reacted differently to Bethlehem Steel's attempts to order more ships.

Based on the entire record, the court finds a genuine issue of material fact regarding the causal connection between Litton's unsuccessful shipping and shipbuilding business and alleged actions of defendants.

III.

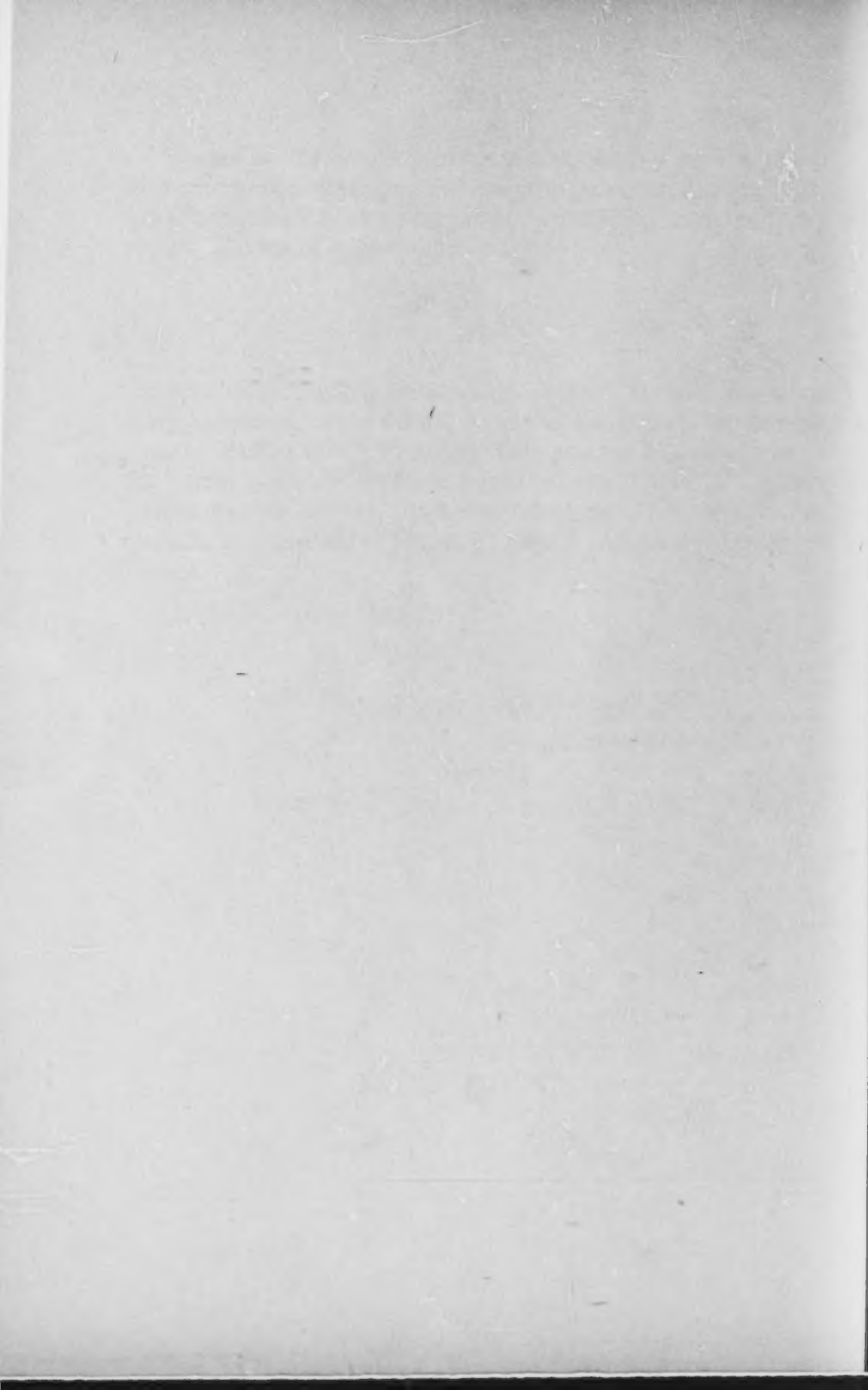
For the foregoing reasons, defendants' motions for summary judgment, based on the statute of limitations, are hereby denied. Partial summary judgment is granted to defendants to the extent plaintiffs' claim is based on the failure of Litton's "conveyor belt scheme," as described in part II.A. In all other respects, as discussed in part II.B., partial summary judgment is denied.

IT IS SO ORDERED.

/s/ WILLIAM THOMAS

U.S. District Senior Judge

APPENDIX J



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C81-372

LITTON INDUSTRIES, INC., *et al.*
Plaintiffs,

v.

PENN CENTRAL CORPORATION, *et al.*
Defendants.

MEMORANDUM AND ORDER

THOMAS, Senior Judge

Plaintiffs' complaint, filed on March 5, 1981, alleges that defendants engaged in an antitrust conspiracy in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, section 3 of the Clayton Act, 15 U.S.C. § 14, as well as various sections of Ohio's Valentine Act, Ohio Rev. Code Ann. Ch. 1331.¹ More specifically, plaintiffs Litton Industries, Inc., Litton Systems, Inc., Litton Great Lakes Corporation and Erie Marine, Inc. (Litton), allege the following:

[D]efendants deliberately and directly acted, combined and conspired to restrain and suppress trade in the business of carrying iron ore and other bulk commodities in self-unloading and certain bulker vessels moving on the Great Lakes, in the business of designing, constructing, selling, chartering and using self-unloading vessels on the Great Lakes, and in the business of providing dock services for iron ore and other bulk commodities moving over docks on the Great Lakes.

¹ Plaintiffs allege violations of sections 1331.01-02, 1331.04, 1331.06, 1331.08, 1331.12 and 1331.14 of the Ohio Revised Code.

Plaintiffs allege that defendants carried out this conspiracy by means of several overt acts and practices. For example, defendants allegedly refused "to permit Litton to purchase, lease or use dock facilities which could have accommodated the technologically advanced self-unloading vessels being designed and constructed by Litton," and imposed "artificial, arbitrarily high and unjustifiable dock handling charges on iron ore discharged from self-unloading vessels, in order to discourage and prevent the use of such vessels."

Defendants Baltimore & Ohio Railroad Company (B&O), the Chesapeake & Ohio Railway Company (C&O), the Chessie System, Inc., and CSX Corporation (Chessie), Bessemer and Lake Erie Railroad Company (B&LE), and Norfolk and Western Railway Company (N&W) move to dismiss plaintiffs' complaint on jurisdictional and antitrust immunity grounds. N&W argues that the Interstate Commerce Commission (ICC) has exclusive jurisdiction over plaintiffs' claim. Chessie and B&LE contend that defendants are impliedly immune from the antitrust laws for rate-making activities. All defendants raise two further grounds for dismissal: (1) the alleged activities underlying plaintiffs' claims are expressly immunized from the antitrust laws by the Interstate Commerce Act (ICA); and (2) plaintiffs' treble damage claims are barred by the doctrine of *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922). Defendants alternatively argue that this case should be referred to the ICC under the doctrine of primary jurisdiction.

This court has previously examined these same issues in the related case of *Pinney Dock & Transport Co. v. Penn Central Corp.*, C80-1733 (N.D. Ohio). In a memorandum and order of June 21, 1983, the court denied defendants' jurisdictional motions. The court's June 21, 1983 jurisdictional ruling in *Pinney* was reaffirmed upon reconsideration in rulings of March 29, 1984 and May 10, 1984.²

² In parts II and IV of the court's order of March 29, 1984, *Pinney* was asked to respond to two inquiries. *Pinney's* response first stated that it "will not ask the Court to determine either hypothetical line-haul rates or

(footnote continues)

The alleged antitrust conspiracy at issue in the instant case is virtually identical to that alleged in *Pinney*. For the reasons stated in the above-listed *Pinney* rulings, the court concludes that: the ICC does not have exclusive jurisdiction over plaintiffs' claim; that the anticompetitive activities alleged by Litton are not expressly or impliedly immunized under the antitrust laws; and that the *Keogh* doctrine does not preclude plaintiffs' claim for treble damages. Further, the court determines that referral of this case to the ICC under the doctrine of primary jurisdiction is not appropriate.

Treating the several motions as summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure, the court finds that there are genuine issues of material fact with respect to these motions and defendants are not entitled to judgment as a matter of law.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS

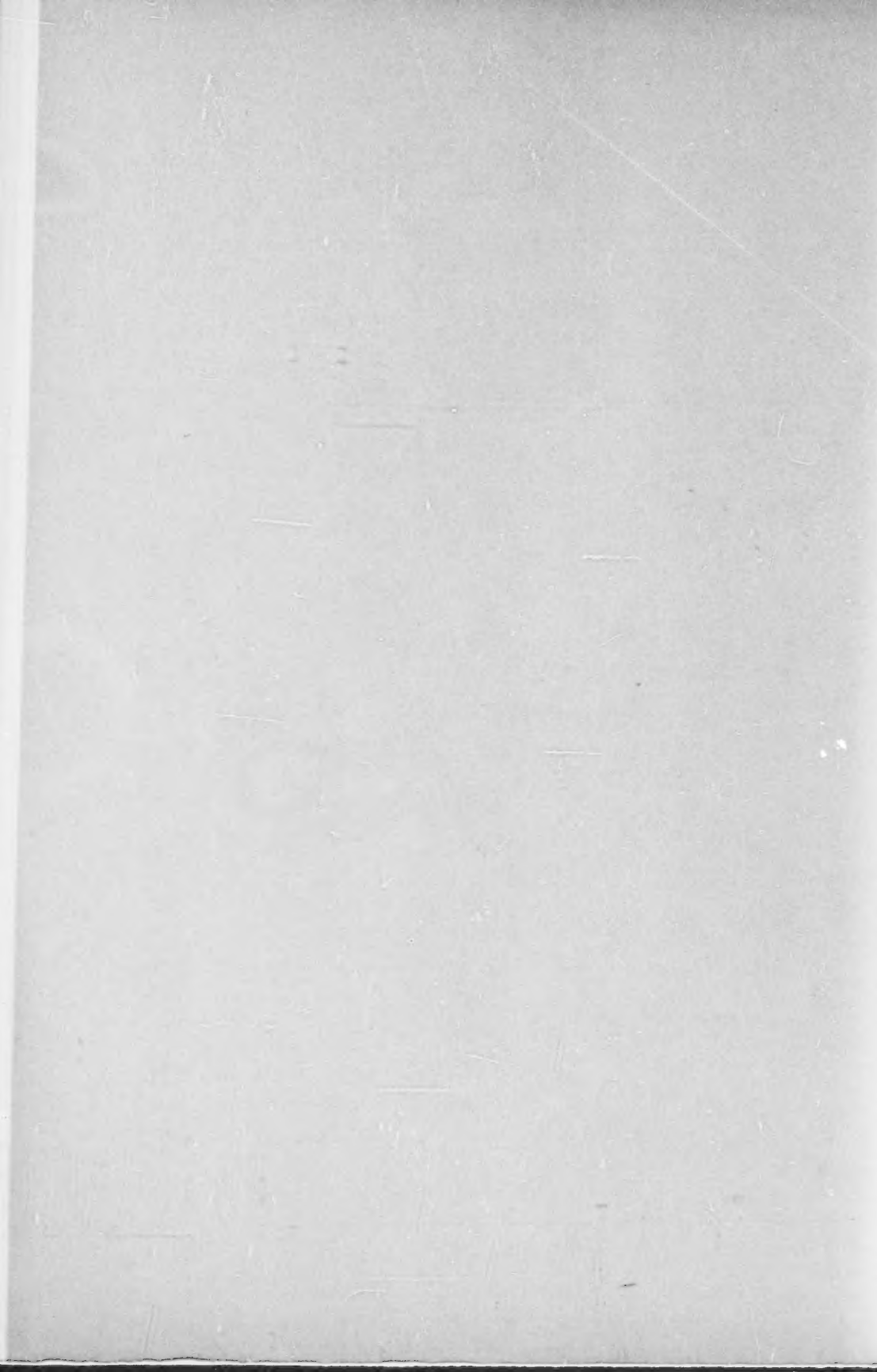
U.S. District Senior Judge

(footnote continued)

hypothetical handling charges." As to the second inquiry, Pinney stated that it "will not claim that defendants incurred antitrust liability by failing to adhere to formal practices or procedures mandated by their 5a agreement or by the ICC." Based on the plaintiff's response of April 30, 1984, the court on May 10, 1984 reaffirmed its original ruling of June 21, 1983. The court assumes that the response of plaintiffs in the instant case would be the same as Pinney's response.



APPENDIX K



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C81-372

LITTON INDUSTRIES, INC., *et al.*
Plaintiffs

v.

PENN CENTRAL CORPORATION, *et al.*
Defendants

ORDER

THOMAS, Senior Judge

In a memorandum and order of May 10, 1984 in the related case of *Pinney Dock & Transport Co. v. Penn Central Corp.*, C80-1733 (N.D. Ohio), the court certified certain *Pinney* rulings for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). For the reasons stated in part II of that order, the court hereby amends the October 4, 1984 statute of limitations ruling and the October 5, 1984 jurisdictional ruling in the instant case to include the following statement:

The court is of the opinion that this order involves a controlling question of law for which there is a substantial ground for difference of opinion and that immediate appeal may materially advance the ultimate termination of this litigation.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS

U.S. District Senior Judge



APPENDIX L



No. 84-8386

No. 84-8387

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LITTON INDUSTRIES, INC.,
LITTON SYSTEMS, INC.,
LITTON GREAT LAKES CORPORATION,
AND ERIE MARINE, INC.,

*Respondents
Cross-Petitioners,*

v.

ORDER

PENN CENTRAL CORPORATION, *et al.*,
Defendants

CHESAPEAKE & OHIO RAILWAY COMPANY,
BALTIMORE & OHIO RAILROAD COMPANY,
THE CHESIE SYSTEM, INC., CSX
CORPORATION, NORFOLK & WESTERN
RAILWAY COMPANY AND BESSEMER &
LAKE ERIE RAILROAD COMPANY

*Petitioners,
Cross-Respondents.*

BEFORE: KEITH, MARTIN AND CONTIE, Circuit Judges

Pursuant to 28 U.S.C. § 1292(b) and Rule 5, Federal Rules of Appellate Procedure, the parties to this antitrust action seek leave to appeal the district court's interlocutory orders of October 4 and 5, 1984 denying (except as to one claim) the defendants' motions for summary judgment. Upon consideration thereof, and noting the legal issues sought to be raised on appeal are the same as those raised in *Pinney Dock & Transport Co. v. Penn Central Corp., et al.* Cases Nos. 84-3653-

54, a related action in which this Court has granted interlocutory review,

No. 84-8386

No. 84-8387

It is ORDERED that both petitions for leave to appeal under § 1292(b) be and they hereby are granted.

Upon agreement of the parties,

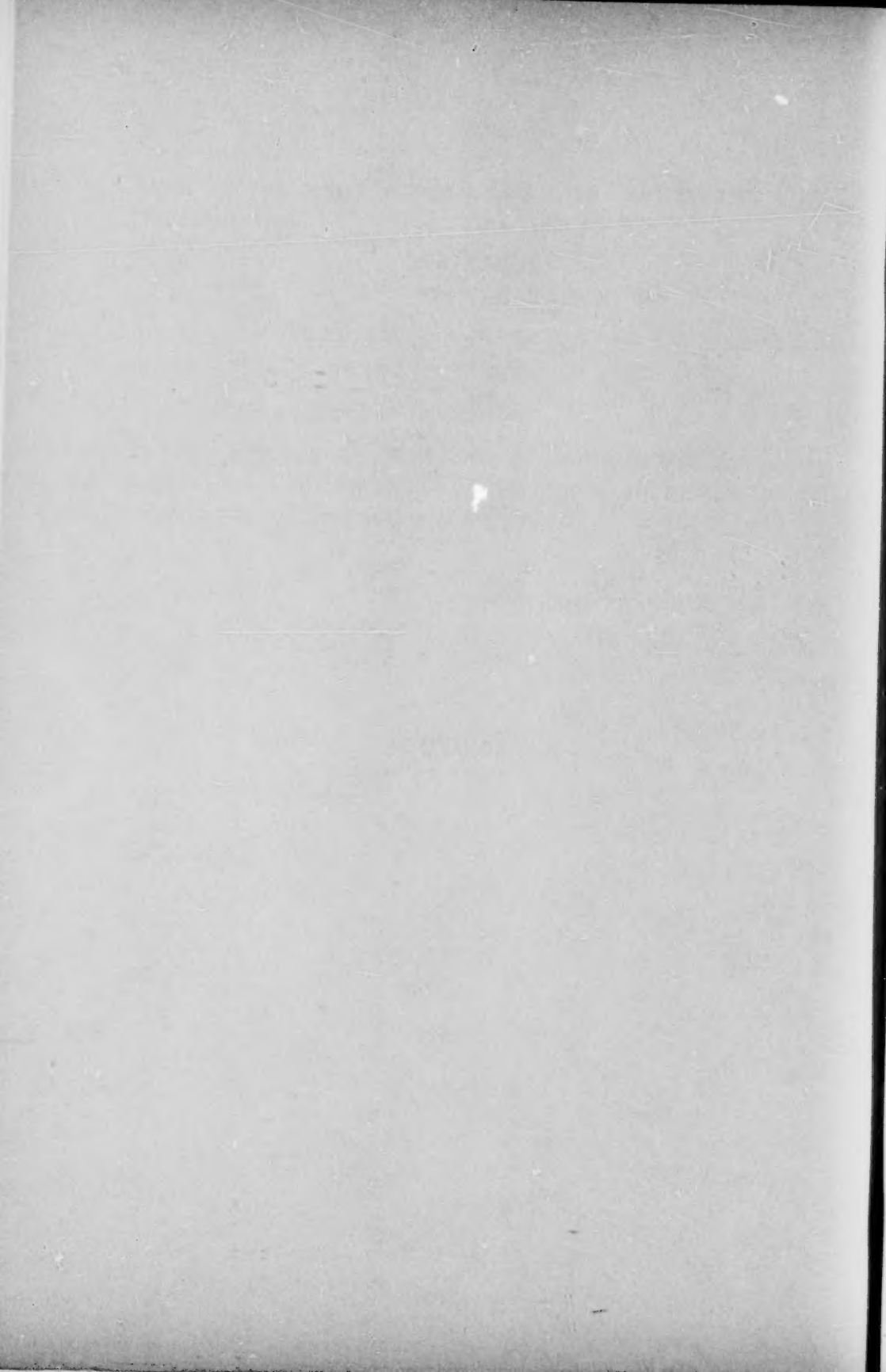
It is further ORDERED that these appeals be consolidated with Cases Nos. 84-3653-54 upon the Court's calendar for purposes of briefing and oral argument.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HELMAN

Clerk

APPENDIX M



**COURT OF APPEALS
NO. 84-3653 & 84-3654**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PINNEY DOCK & TRANSPORT COMPANY

Dist. Ct. No. C80-1733

vs.

PENN CENTRAL CORPORATION, *et. al.*

**Dist. Ct. at Cleveland, Ohio
Eastern Division**

This is to advise that on 9/24/84 this Court ordered that the record be retained by the district court pursuant to Rule 11(e), F.R.A.P. The complete record consists of 10 volumes of pleadings, 10 volumes of depositions and 20 volumes of transcript.

9/24/84

Date

/s/ David J. Benick

District Court Deputy Clerk



APPENDIX N

**COURT OF APPEALS
NO. 84-3876 & 84-3877**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LITTON INDUSTRIES, INC., *et al.*

Dist. Ct. No. C81-372

vs.

PENN CENTRAL CORPORATION, *et al.*

Dist. Ct. at Cleveland, Ohio

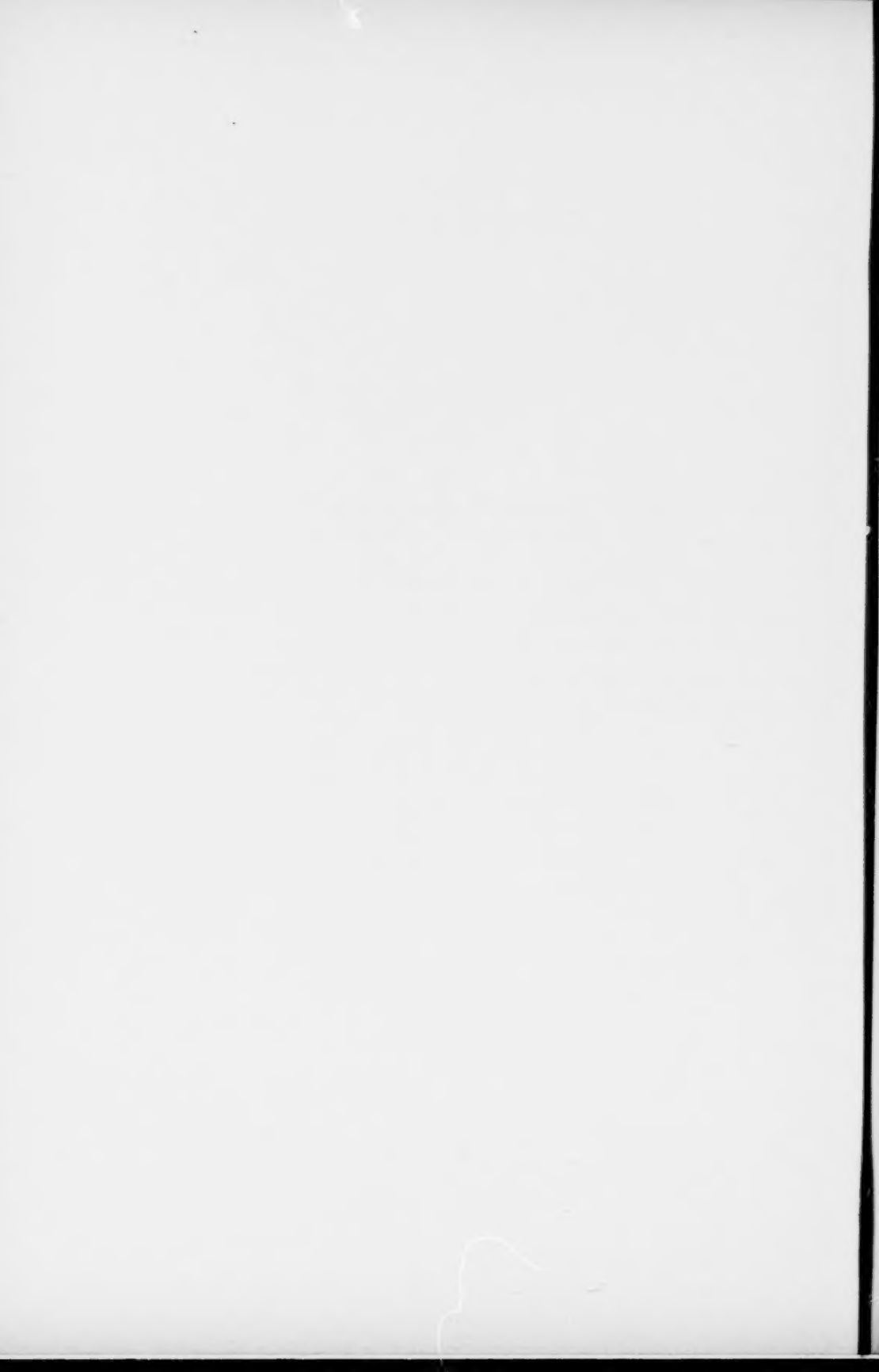
This is to advise that on December 4, 1984 this Court ordered that the record be retained by the district court pursuant to Rule 11(e), F.R.A.P. The complete record consists of 5 volumes of pleadings, 10 volumes of depositions and 12 volumes of transcript.

12/04/84

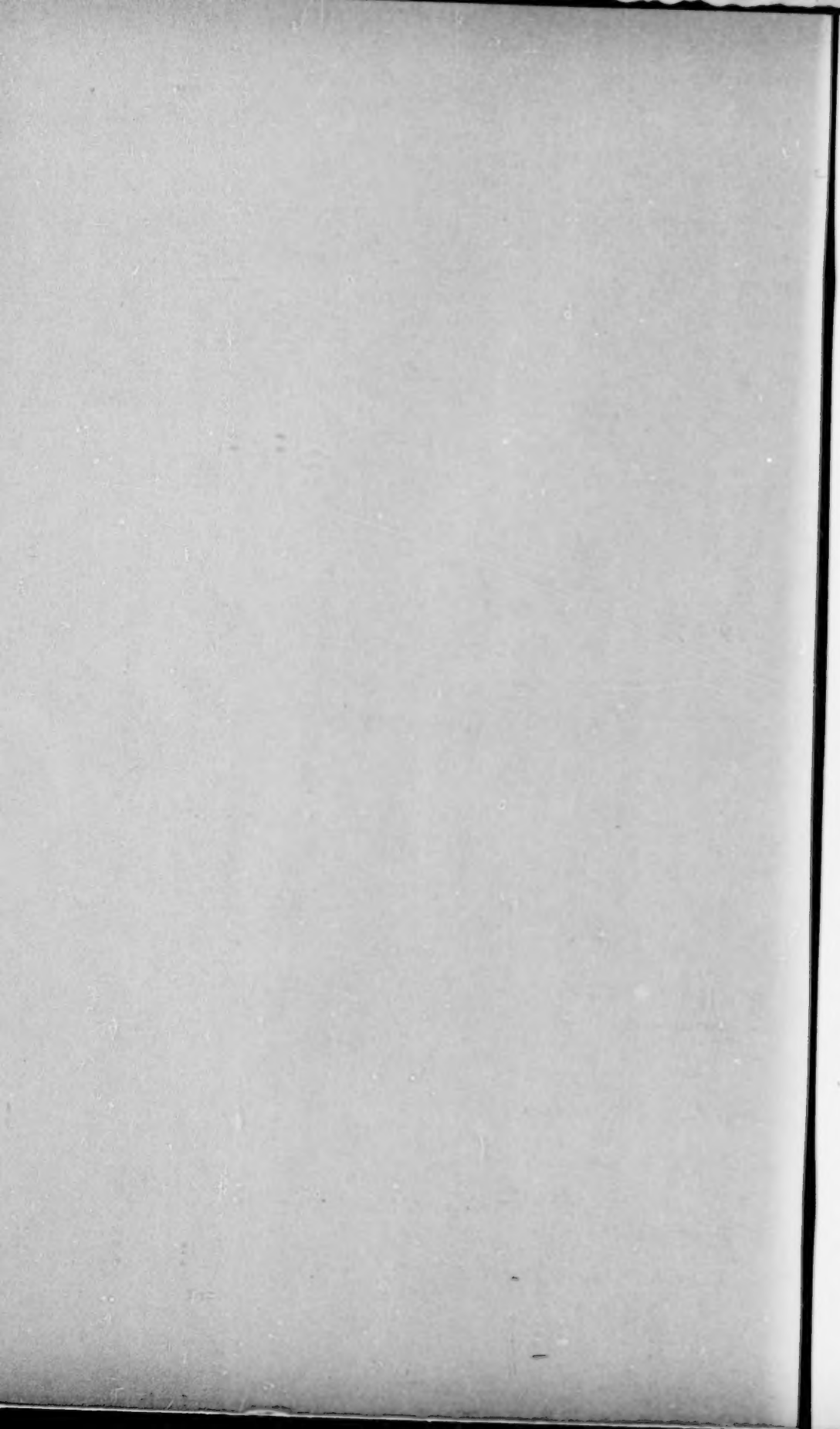
Date

/s/ David J. Benick

District Court Deputy Clerk



APPENDIX O



STATUTORY PROVISIONS INVOLVED

I. Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1 and 2, provide:

Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

II. Sections 3, 4, and 4B of the Clayton Act, 38 Stat. 731 (1914), as amended by 69 Stat. 283 (1955), 15 U.S.C. §§ 14, 15, and 15b provide, in part:

Section 3: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a

price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4: [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 4B: Any action to enforce any cause of action under sections 15 and 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

III. At times relevant to this case, Section 5a of the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, 62 Stat. 472 (1948) (formerly codified at 49 U.S.C. § 5b (1976 ed.) and currently codified at 49 U.S.C. § 10706), provided, in part:

- (2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and

the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

* * *

- (6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

* * *

- (9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

IV. 28 U.S.C. § 1292(b) provides:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

V. Fed. R. Civ. P. 56(c) provides, in part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

VI. Sections 1331.01 & .02, 1331.04, 1331.06, 1331.08, 1331.12, and 1331.14 of the Ohio Valentine Act, Chapter 1331, Ohio Revised Code are also at issue in these cases, although are not involved in this petition for certiorari. These provisions are not set forth in this Appendix.



(3)

No. 88-72

Supreme Court, U.S.

FILED

AUG 10 1988

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

PINNEY DOCK & TRANSPORT Co.,
Petitioner,

v.

NORFOLK & WESTERN RAILWAY Co., *et al.*

LITTON INDUSTRIES, INC., *et al.,*
Petitioners,

v.

NORFOLK & WESTERN RAILWAY Co., *et al.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

1. Introduction

These cases involve an antitrust challenge to railroad rates that were set over thirty years ago. The rates in question were the product of a legal system that displaced the antitrust norm by promoting, immunizing and

regulating agreements among competitors. This legal system, which below justified dismissal of Petitioners' rate claims on alternative grounds, was largely dismantled by Congress eight years ago, and the collective rate setting disputed here is ancient history.

The Petitioners are Pinney Dock and Litton, respectively a dock company and a shipbuilding company. Each alleges that the Respondent railroads committed anti-trust violations in the iron ore transportation industry dating back to the mid-1950's.¹ In particular, Petitioners' complaints describe two categories of unlawful acts: rate actions arising out of Respondents' participation in a collective ratemaking organization approved and administered by the Interstate Commerce Commission; and, to a lesser extent, non-rate actions. With respect to iron ore rates, Petitioners allege that the Respondent railroads (1) charged inland (line-haul) rail rates from private docks that were too high, and (2) set handling charges for self-unloader vessels unloaded at railroad docks that also were too high. Pet. App. at 8a. As for non-rate allegations, Petitioners complain about refusals to sell or lease land suitable for dock operations and unspecified "harassment" of trucking. Pet. at 3-4. According to Petitioners, "but for" these actions, industries would have been transformed: steel companies in Ohio and Pennsylvania would have shifted their iron ore transportation from bulker vessels, railroad docks and rail service to self-unloading vessels (some of which would have been built by Litton), private docks (such as Pinney) and trucking. Pet. App. at 10a-11a.

It is undisputed that throughout the twenty-five year period at issue here Respondents' rail rates and dock handling charges were subject to the plenary authority of the ICC under the standards of the Interstate Commerce

¹ The identity of the Respondents and other information required by Rule 28.1 are set forth in Appendix A.

Act ("ICA"). It is also undisputed that the Respondents were parties to an ICC-approved rate bureau agreement and that rates made in accordance with the agreement were expressly "relieved from the operation of the anti-trust laws" by statute. *See id.* at 4a-7a.

2. *The Decision Below*

The Court of Appeals dismissed Petitioners' "rate-related" claims on three independent grounds, and further held that the statute of limitations barred all federal claims that occurred more than four years before the actions were commenced. Pet. App. at 75a-76a. The court reversed the district court's orders on these issues pursuant to 28 U.S.C. § 1292(b).²

The Court of Appeals held that Petitioners' rate claims were barred by the express antitrust immunity Congress provided for collective ratemaking in the Reed-Bulwinkle Act of 1948. The court based its decision on the statutory language, which exempts the "making" and the "carrying out" of an ICC-approved rate bureau agreement. Pet. App. at 23a-24a. It also relied on the fact that Respondents were parties to such an agreement and that Petitioners had waived any claim that Respondents did not comply with the terms of the ICC-approved rate bureau agreement. *Id.* at 7a, 28a. Consequently, the legal issue on appeal was whether, as Petitioners argued, the court should create an exception to the express immunity for collective ratemaking which, though squarely within the statutory protection, allegedly was accompanied by "anti-competitive intent." The Court of Appeals rejected this argument on the grounds that it was not consistent with the plain language of the statute and

² The district court previously had denied Respondents' motions for summary judgment, but certified its orders for interlocutory appeal as involving legal issues "as to which there is substantial ground for difference of opinion." The Court of Appeals agreed to review the orders. Pet. App. at 243a, 255a, 315a, 317a.

that a judicially-implied exception based on anti-competitive motive would be unworkable since the process of joint ratemaking endorsed by Congress was itself "undeniably anti-competitive." *Id.* at 24a.

The Court of Appeals also held that, wholly apart from the express statutory immunity, the *Keogh* doctrine provided an alternative basis for striking the rate claims. *Id.* at 16a-22a. Closely following the rationale of this Court's opinion in *Keogh*, the court barred Petitioners' damages claims "insofar as these claims are based either on defendants' own handling charges or on the line-haul rate that was applied from Pinney Dock." *Id.* at 16a-17a, 21a. The court expressly held, however, that *Keogh* did not bar Petitioners' non-rate claims, including the alleged refusal to sell or lease land and the alleged harassment. *Id.* at 21a-22a, 75a-76a.

As a third independent basis for dismissing certain of Petitioners' rate claims, the Court of Appeals applied the principles of antitrust standing established in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("AGC"). After carefully balancing the factors which supported and negated Petitioners' standing, focusing particularly on the speculative and attenuated chain of causation underlying Petitioners' theories, the court held that "the AGC factors clearly favor defendants." Pet. App. at 36a. Accordingly, as a matter of law based on the complaint allegations, the court dismissed the subject rate claims on this alternative ground.³

The final section of the Court of Appeals' opinion at issue here addressed the question whether Petitioners had raised a triable issue with respect to their assertion that the four-year limitations period should be tolled on

³ Specifically, the court held that "all rate-related claims except for Pinney's claim that defendants did not grant it a commodity line-haul rate [which Respondents did not challenge] are subject to dismissal on the alternative basis of standing." Pet. App. at 76a.

account of "fraudulent concealment."⁴ The court carefully reviewed the fraudulent concealment standards that Petitioners were required to satisfy.⁵ After deciding the legal standard for "actual concealment," the court concluded that there might be a genuine factual dispute on this issue. Pet. App. at 64a. However, with respect to Petitioners' separate burden of establishing both lack of knowledge of, and due diligence in pursuing, their claims, the court held that there was no escaping the fact that Petitioners had gained sufficient knowledge of the elements of their claims well more than four years before their complaints were filed:

[T]he time eventually arrived when the "alleged conspiracy was no longer concealed and could have been discovered by due diligence well within the statutory period for bringing suit."

Id. Indeed, as to Petitioner Pinney, the court found that fully twelve years prior to filing its complaint, it had been advised by counsel to file an antitrust suit "to fight this combination," but did not pursue the matter then because it concluded it would be better to wait until there was more self-unloader capacity. *Id.* at 64a-65a. Having found no genuine issue of material fact on these essential elements of the fraudulent concealment doctrine, the court held that the statute of limitations could not be tolled, and that Petitioners could only pursue federal claims arising within the four-year period. *Id.* at 76a.

⁴ The Court of Appeals also reversed the district court on the issue of preemption of state law, holding that the federal four-year limitations period for antitrust actions does not preempt the application of the no-limitation provision in Ohio's state antitrust statute. Pet. App. at 71a-75a.

⁵ It is well-established, and not in dispute here, that an antitrust plaintiff seeking to avoid the four-year statute of limitations has the burden of proving three elements: (1) actual concealment of the unlawful conduct by defendants; (2) lack of knowledge of the underlying conduct on the part of the plaintiff; and (3) due diligence in seeking to discover its claim. Pet. App. at 37a.

REASONS FOR DENYING THE WRIT

To change the result below, Petitioners necessarily have sought review (and will seek reversal) on at least four issues. Pet. at i, Questions 1, 2, 3(a) and 3(b). The Court of Appeals, as explained above, found that three separate and distinct legal grounds required dismissal of Petitioners' rate claims. These alternative holdings are addressed by Petitioners in Questions 1, 2 and 3(a).⁶ Thus, to reinstate the essential elements of Petitioners' Sherman Act claim, this Court would have to grant *certiorari* (and ultimately reverse) on all of the questions presented.

Petitioners' effort to gain review in this Court begins with two mischaracterizations. Petitioners contend that this case presents "important and recurring questions concerning immunity," without mentioning that the collective ratemaking by railroads to which the statutory immunity applied has been a dead letter since shortly after the 1980 railroad deregulation legislation. Pet. at 10. Petitioners also vastly overstate the holding of the Court of Appeals as having "conjured up" a broad immunity, which "effectively nullified the federal antitrust laws," without noting that it was Congress, not the court below, that created the express antitrust immunity for railroad rate agreements during the time period at issue here, and that the decision below applies this immunity *only* to rate actions clearly within the letter of the statutory provision. *Id.* at 10, 12.

The Court of Appeals did not depart from legal precedent, but instead properly applied the governing statutory provisions and decisions of this Court. It most as-

⁶ In their Question 3, Petitioners blend issues relating to both the statute of limitations and standing holdings below. The standing element pertains primarily to the *rate* claims, while the statute of limitations ruling permits Petitioners to pursue only those federal claims arising within four years of institution of suit.

surely did not, as Petitioners repeatedly imply, extend its immunity or *Keogh* holdings beyond the rate claims to which Congress and this Court have declared them applicable. *Id.* On the contrary, Petitioners' non-rate-based theories were preserved to the extent such claims were not otherwise barred by the Clayton Act's four-year statute of limitations or standing principles. The questions presented in the Petition do not warrant this Court's attention, either individually or collectively, and the writ should not issue.

I. Statutory Immunity (Question 1)

Petitioners say that the question presented is

Whether, as the court of appeals held (in conflict with the District of Columbia Circuit's decision in the criminal case against respondents for the same conduct), the participants in a conspiracy to eliminate direct competitors are immune from antitrust accountability in the federal courts *because* they are regulated by a federal administrative agency.

Pet. at i (emphasis added). This question is not presented here for the simple reason that it is based on a totally inaccurate portrayal of the Court of Appeals' decision. Deferring for the moment the supposed conflict in the circuits, it is important to make clear that the immunity applied by the Court of Appeals is not, as Petitioners suggest, derived by implication from some amorphous penumbra of federal regulation. Rather, the court's decision is based solely on an explicit statutory provision by which Congress conferred an express anti-trust immunity upon railroads for collective ratemaking. Pet. App. at 22a-28a.

a. The Court of Appeals relied, not merely on the fact of regulation, but on the plain language of the Reed-Bulwinkle Act. This immunity statute provided that the parties to an ICC-approved rate bureau agreement are

relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.⁷

Properly focusing on the statutory language, the court recognized that the rate activity Petitioners challenge was within the statutory protection for “carrying out” the rate bureau agreement. Pet. App. at 24a-25a. The purpose of the ICC-approved agreement, the court noted, was “the establishing of rates,” and the ICC contemplated “concerted activity” when it approved the ratemaking agreement. *Id.* The court’s decision simply acknowledges that, by jointly deciding upon rates and then charging those rates, Respondents were engaging in conduct to “carry out” the agreement.

The Court of Appeals further held that the challenged rate decisions were made “in conformity with” the agreement approved by the ICC. Indeed, because Petitioners waived any claim of noncompliance with the Commission’s authorized ratemaking procedures, this holding was unavoidable. Pet. App. at 28a.⁸ While Petitioners now appear to be uncomfortable with that waiver and try to escape from it, Pet. at 13 n.10, the waiver of all claims of procedural noncompliance is unambiguous in Petitioners’ pleadings before the district court. They repeatedly represented that they “will not claim that defendants incurred antitrust liability by failing to adhere to formal

⁷ Ch. 491, 62 Stat. 472-73 (1948), codified at 49 U.S.C. § 5b(9) (1976), recodified, as amended, at 49 U.S.C. § 10706 (1982); Pet. App. 324a-326a.

⁸ The Court of Appeals recognized that Petitioners’ waiver of the procedural compliance issue was made to avoid an otherwise necessary referral (under the primary jurisdiction doctrine) to the ICC of questions involving interpretation of the Commission’s 5a agreement and orders. Pet. App. 28a.

practices or procedures mandated by their 5a agreement or by the ICC." C.A. App. 590, 597-98. This case therefore does not present any question concerning the antitrust implications of failing to follow the rate bureau procedures upon which the statutory immunity is based.⁹

b. The Petition seeks to avoid the plain language of the Reed-Bulwinkle immunity by suggesting that the Court of Appeals broadened the immunity beyond the bounds established by Congress. Pet. at 12.

(i) To the contrary, the decision below limited its immunity holding to the "rate-related" claims; it did not confer a general antitrust immunity on the railroads, or extend this holding to non-rate activities. Pet. App. at 28a, 75a.

(ii) To the extent Petitioners argue that the immunity should not be given effect as to covered ratemaking because Petitioners have also alleged that Respondents engaged in other, non-rate conduct which was *not* subject to the express immunity, their argument finds no support in either the language of the statute or its purposes. The Court of Appeals simply recognized that the conduct covered by the express statutory immunity is not deprived of that immunity because of other conduct alleged by Petitioners. Where conduct is immune from antitrust scrutiny, and even where it is "intended to eliminate competition," that conduct remains immune "either standing alone or as part of a broader scheme itself violative of the Sherman Act." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). On the other hand, the decision below properly excluded non-rate claims from the immunity holding, because they are not covered by the statutory protection.

⁹ Petitioners' unseemly attempt to create a belated dispute over the scope of the waiver is not worthy of this Court's attention.

(iii) Petitioners' further contention regarding the "right of independent action," Pet. at 12, is unavailing not simply because Petitioners never argued it to the Court of Appeals, but because it is yet another issue of compliance with the rate bureau agreement that would require the referral to the ICC which Petitioners avoided with their waiver.

c. As to the conflict in the circuits that Petitioners advertise in their question presented, it is entirely illusory. Pet. at i, 12-13. The decision on which Petitioners rely, *United States v. Bessemer & Lake Erie Railroad*, 717 F.2d 593 (D.C. Cir. 1983), was on appeal from a *nolo contendere* plea in a criminal case, and, as such, the court had to accept all indictment allegations as true. *Id.* at 598. In that posture, the court ruled that the express immunity did not apply because the indictment made allegations both of ratemaking that did not conform to the ICC-approved rate bureau procedures and of non-rate conduct, which by definition was subject matter "not within the scope of a Section 5a agreement." *Id.* at 601-602. Thus, the *Bessemer* case stands only for the unremarkable proposition that the immunity is unavailable for conduct outside the statutory provision, a holding that is entirely consistent with the Sixth Circuit decision below.¹⁰

¹⁰ Petitioners apparently have abandoned their central argument below that, based on *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transp. Ass'n*, 253 F.2d 877 (D.C. Cir. 1958), ratemaking explicitly protected by Congress somehow loses its immunity if it is undertaken with an "unlawful purpose." See Pet. at 13 n.9. The Court of Appeals properly rejected this argument on the grounds that no such motive exception appeared in the statute, and that to imply one would defeat the legislative intent to immunize collective rate-making that was "undeniably anti-competitive." Pet. App. at 24a. Moreover, virtually all of the cases cited by Petitioners on this issue (Pet. at 13 n.9) were decided prior to this Court's decision in *United Mine Workers v. Pennington*, which held that immune activity cannot violate the antitrust laws, "either standing alone or

d. Petitioners' final contention on the immunity issue is difficult to discern, but appears to be that, despite the plain language of the statute, Congress really meant to exclude from the Reed-Bulwinkle immunity either all "conspiracies," or at least a "conspiracy to eliminate a competitor." Pet. at i, 13-15. Their argument proves too much, however, for every rate decision collectively made by competing railroads could be characterized as a "conspiracy" within the meaning of the Sherman Act, and, as the Court of Appeals recognized, the scheme of collective ratemaking Congress intended to promote was "undeniably anti-competitive." Pet. App. at 24a. Moreover, Petitioners' view on this point is refuted flatly by this Court's statement in *Square D* that the Reed-Bulwinkle Act "created an *absolute immunity* from the anti-trust laws for approved collective ratemaking activities." *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 419 (1986) (emphasis added). The Court of Appeals therefore correctly declined Petitioners' invitation to rewrite the statute in a manner inconsistent with the clear legislative purpose.¹¹

as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670. Indeed, *Aircoach* relied on the district court decision in *Noerr*, a decision that was ultimately overturned by this Court. 253 F.2d at 887. See *Noerr Motor Freight, Inc. v. Eastern R.R. Pres. Conf.*, 155 F.Supp. 768 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961). It is not surprising therefore that, contrary to Petitioners' assertion, the court in *Bessemer* pointedly declined to rest its decision upon *Aircoach*, but instead evaluated the allegations of the indictment under the language of the statute. 717 F.2d at 600.

¹¹ Petitioners' reliance on selected excerpts from the Reed-Bulwinkle legislative history for a "conspiracy" exception is misplaced. Pet. at 14. All the House report says is that the Act would not affect the outcome of *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), which predated passage of the Act. The smattering of comments from the floor debate indicate only that certain legislators did not intend to immunize certain kinds of conspiracies, such as ones outside the rate bureau or involving non-rate conduct. There is nothing in any of this history inconsistent with the judg-

e. By the standards that this Court employs to determine the importance of an issue for *certiorari*, Petitioners' statutory immunity question is decidedly unimportant in either a practical or a jurisprudential sense. The proper scope and construction of the Reed-Bulwinkle immunity is now largely beside the point. With the passage of the Staggers Rail Act of 1980, Congress not only deregulated many aspects of railroad rates, but substantially restricted antitrust immunity.¹² As a result, the railroads' rate bureau ceased operations many years ago. Thus, not only was the Court of Appeals correct, but it is virtually inconceivable that the issue that Petitioners ask this Court to review will arise ever again.

II. *Keogh* (Question 2)

Petitioners' challenge to the Court of Appeals' alternative holding, which follows this Court's decision in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), simply ignores the rationale of that case. The decision below rejected Petitioners' argument that the application of *Keogh* should depend on who the plaintiff is in a given case (*e.g.*, shipper vs. competitor), because such a distinction would be inconsistent with *Keogh*'s rationale. Pet. App. at 19a-20a. The court recognized that *Keogh* focuses on rates and the nature of the antitrust claim being made, not the identity of the party

ment below that Respondents' ratemaking, carried out "in conformity with" their ICC-approved rate bureau agreement, was protected by the statute. In any event, floor statements, even by a sponsor, "have never been regarded as sufficiently compelling to justify a deviation from the plain language of a statute." *United States v. Oregon*, 366 U.S. 643, 648 (1961). See also *Garcia v. United States*, 469 U.S. 70, 76-79 (1984) (giving effect to statutory language despite an inconsistent statement by the floor manager).

¹² Pub. L. No. 96-448, 94 Stat. 1895 (1980). Neither the Staggers Act, nor the earlier Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), was claimed to be applicable to the facts of the instant case. Pet. App. at 7a n.8.

making it. If the plaintiff claims that something other than the filed rate should have been the rate that was actually charged, then the claim is inconsistent with *Keogh's* holding regarding the legal significance of filed rates within the framework of the Interstate Commerce Act and the antitrust laws.

a. In *Keogh*, this Court held that, having vested the Interstate Commerce Commission with control and authority over railroad rates, Congress did not intend a plaintiff to use the antitrust laws to attack existing rates as unlawful and thereby obtain the benefit of a different rate than the rate actually filed and authorized under the ICA. Thus, *Keogh* concluded that an antitrust claim could not be maintained where rates were "the instrument by which [the plaintiff] is alleged to have been damaged." 260 U.S. at 161. Rather, Congress intended the lawfulness of regulated rates to be the sole province of the ICA:

A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce.

Id. at 162.

This Court reasoned that "[i]njury implies violation of a legal right," *id.* at 163, but the law (the Interstate Commerce Act) provides that, once a rate is filed with the ICC and published in the tariff, a carrier may not charge anything else.¹³ Unless a filed rate is suspended or set aside by the Commission, no one may complain that its legal rights were violated when all that was paid,

¹³ "[N]or shall any carrier charge . . . or receive a greater or less or different compensation for [the] transportation . . . or service . . . than the rates, fares, or charges which are specified in the tariff filed and in effect at the time." Hepburn Act of 1906, ch. 3591, § 2, 34 Stat. 584, 586 (1906), codified at 49 U.S.C. § 6(7) (1976), recodified at 49 U.S.C. § 10761(a) (1982).

or charged, was the rate in the filed tariff. *Id.* Given the statutory framework of the Interstate Commerce Act, a jury empanelled to hear an antitrust case cannot be allowed as a predicate for condemning existing rates to speculate about what hypothetical rates might otherwise have been filed by the carriers and authorized under the ICA. To permit such speculation about rates that might have been permissible under the ICA would undermine the Commission's ability to preserve a uniform and non-discriminatory rate structure, as Congress intended. *Id.* at 163-64.¹⁴

Indeed, at the practical core of *Keogh* is the understanding that Congress intended anyone who believes that rates are too high or otherwise unlawful to take the complaint about those rates to the ICC, which has exclusive authority to ensure that rates are both reasonable and non-discriminatory. The shipper in *Keogh* had the statutory right to take any grievances it had about rates to the Interstate Commerce Commission, which entertained such complaints. Here, the Court of Appeals read the statute and quite properly found that competitors had exactly the same access to the Commission to complain about rates as did the shipper in *Keogh*. Pet. App. at 20a.¹⁵

¹⁴ As a separate element of its reasoning in that case, the *Keogh* Court also noted that an award of damages to one shipper might create discrimination prohibited by the ICA. 260 U.S. at 163. The Court of Appeals acknowledged that this aspect of the rationale loses force in a competitor context, but correctly held that the remaining three prongs of the *Keogh* rationale were fully applicable. Pet. App. at 21a.

¹⁵ Congress expressly provided that "any person" could file a complaint at the ICC, and could address "anything done or omitted to be done" by a railroad in violation of the ICA. Interstate Commerce Act of 1887, ch. 104, Pt. I, § 13, 24 Stat. 379, 383-84 (1887), codified as amended at 49 U.S.C. § 13(1) (1946), recodified at 49 U.S.C. § 11701(b) (1982) (emphasis added). Recognizing the breadth of its jurisdiction, the ICC has held that "a complainant,

In short, while it is true that the plaintiff in *Keogh* was a shipper, not a competitor, the rationale of the *Keogh* decision forces Petitioners to argue for the proverbial distinction without a difference. Indeed, this Court's prior decisions properly attribute no significance under the ICA to the identity of the plaintiff. *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U.S. 500, 514-15 (1936) (relying in part on *Keogh* to hold that a private warehouse could not pursue antitrust damages based on preferential rail rates granted to a competing warehouse); *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658 (1963) (holding without reference to *Keogh* that a barge line competing with a railroad cannot collaterally attack an ICC-regulated rate in a judicial proceeding).¹⁶

without regard to the nature of its interests, has a right to complain of anything done or attempted to be done in contravention of the provisions of the act, and to have its complaint considered on its merits." *Shaw Warehouse Co. v. Southern Railway*, 308 I.C.C. 609, 612 (1959). The ICC has regularly heard complaints of parties claiming to be competitors, including private docks. See, e.g., *U.S. Phosphoric Products Corp. v. Atlantic Coast Line Railroad*, 206 I.C.C. 411 (1935) (ICC considered and rejected complaint of private dock operator that railroad violated ICA by failing to offer competitive service). In this regard, the Court of Appeals was well aware that Pinney Dock had carefully considered, threatened and then rejected making a formal complaint to the ICC about the rates disputed here. Pet. App. at 64a-65a.

¹⁶ Petitioners' challenge to the Court of Appeals' reliance on *Georgia* as a case applying *Keogh* where the plaintiff was both a shipper and a competitor misses the mark. They argue that the State's amended complaint reveals that Georgia was seeking damages only as a shipper, and not in its role as proprietor of a competing railroad. Pet. at 16-17. This Court's opinion states, however, that "Georgia sues as a proprietor to redress wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions." 324 U.S. at 447 (emphasis added). The notion that the Court would have applied *Keogh* to dismiss Georgia's shipper damage claims, but would not have done so for damage claims lodged by Georgia as a competitor against the very same rates is

Petitioners argue for a limit on *Keogh* based on their characterization of *Square D* as a begrudging reaffirmation, resting more on *stare decisis* (so Petitioners assert) than on an embrace of its rationale. Pet. at 17. While the *Square D* opinion focuses on *stare decisis*, as one would expect in a case involving a request to overrule a long-standing decision, in fact this Court recognized the breadth of the *Keogh* doctrine and its historic significance. Thus, the Court both rejected an attempt to limit *Keogh* to its facts, noting that the decision does not admit of such a "narrow reading," 476 U.S. at 417 n.19, and confirmed *Keogh*'s importance as an "essential element of the settled legal context" where the antitrust and interstate commerce laws intersect. *Id.* at 423 (emphasis added). As the Court of Appeals properly held, so long as *Keogh* is good law (and it will be good law unless Congress acts to overturn it), it simply cannot be stripped of its rationale and artificially confined to its precise facts.

b. To attract this Court's attention to *Keogh*, Petitioners once again mistakenly claim a conflict in the circuits. The three cases upon which they principally rely did not involve the Interstate Commerce Act at all, but related to entirely different regulatory schemes with different provisions and different legislative intent. See *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1120 (3d Cir. 1970) ("The [Communications] Act does not impose . . . the kind of comprehensive regulation which, after 1920, the ICC exercised over the rail-

unsupported in the decision and implausible in light of *Keogh*'s broad rationale and this Court's refusal, over forty years after *Georgia* and sixty years after *Keogh*, to limit *Keogh* strictly to its facts. *Square D*, 476 U.S. at 417 n.19. But, regardless of how one interprets the *Georgia* pleadings, it is clear that there is ample precedent in this Court for barring a competitor from using the courts to attack ICC-regulated rates, which is precisely what the court below did.

roads); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983) (Communications Act); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981) (Federal Power Act).¹⁷ It is one thing to apply *Keogh* according to its terms and rationale to cases subject to the same regulatory scheme involved in *Keogh*—which is what the Court of Appeals did here. However, it would be quite another thing, and quite improper under *Square D*, to seek to undermine *Keogh*'s rationale on the bases of dissimilar (and weaker) regulatory schemes, as Petitioners invite this Court to do. Pet. at 15-16; *Square D*, 476 U.S. at 422-23 n.29 (rejecting the proposition that a decision in the context of maritime regulation undermines *Keogh*, because the Federal Maritime Commission has "far more limited authority over rates than the

¹⁷ Petitioners' cases are distinguishable in other important respects. First, in *Essential Communications*, the "instrument" of injury and damages was not a rate, but a requirement that customers purchase a piece of equipment. 610 F.2d at 1116. Thus, unlike the instant cases, the claim did not require the court to make any forbidden rate determination. Precisely the same equipment purchase requirement was challenged in *Litton*, where the Second Circuit held "this case can be distinguished from *Keogh* . . . because the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged, but instead whether the PCA requirement itself was reasonable." 700 F.2d at 820. Second, in *Essential Communications*, the FCC had expressly "suspended its judgment" on the propriety of the tariff provision in issue "pending further study," 610 F.2d at 1124, and, in *City of Groton*, the agency had expressly disapproved the tariffs in question. 662 F.2d at 930-31. By contrast, the iron ore rates and rate relationships herein were prescribed by the ICC in 1916 (41 I.C.C. 181) and changed only by periodic ICC-approved rate increases. Third, unlike the instant cases, the Third Circuit in *Essential Communications* was confronted with an argument by the defendant that FCC regulation provided an implied blanket immunity from the antitrust laws. 610 F.2d at 1116-17. Indeed, when that Court of Appeals faced an ICA case, it held that a competitor plaintiff could not challenge filed rates under the antitrust laws, a result wholly consistent with *Keogh* and with the decision below. *Seatrail Lines, Inc. v. Pennsylvania R. Co.*, 207 F.2d 255, 260-61 (3d Cir. 1953).

Interstate Commerce Act gives the Interstate Commerce Commission").

In addition, Petitioners mention *Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240 (9th Cir. 1982). That case did involve the ICA, but the issue decided there had little to do with the question presented here. Rather, the focus was on allegations that, through meritless and sham litigation before the ICC, a freight forwarder had been prevented from filing a lower rate for two years. *Id.* at 1246-47. Because the instrument of antitrust injury was frivolous litigation, not an existing rate (as Petitioners here claim), the *Keogh* rationale was not implicated and the Ninth Circuit panel declined to bar the damage claim. *Id.* at 1266-67. The issue decided by that case simply had nothing to do with the identity of the antitrust plaintiff—the point that Petitioners press here.

c. In short, the *Keogh* issue, like the immunity question, is not worthy of *certiorari*. The decision below closely and properly followed this Court's *Keogh* decision, and no other circuit has reached a conflicting result in construing the ICA. Moreover, Congress, to which this Court in its *Square D* decision referred the *Keogh* issue, is currently considering legislation that would repeal the doctrine.¹⁸ For all of these reasons, this Court need not review Question 2.

III. Appellate Jurisdiction (Questions 3(a) and (b))

In the third question presented, while Petitioners do not raise any issue of the substantive correctness of the Court of Appeals' rulings on standing and statute of limitations, they do complain that the court somehow treated these two legal issues incorrectly. Their principal complaint seems to involve the Court of Appeals' deter-

¹⁸ S. 443, 100th Cong., 1st Sess. and H.R. 941, 100th Cong., 1st Sess., 133 Cong. Rec. S1595 and H528 (daily ed. Feb. 3, 1987).

mination that the district court should have granted summary judgment to Respondents on the basis of the statute of limitations. Pet. at 20-25. Petitioners assert that the handling of the summary judgment issue was a "jurisdictional error." *Id.* at 20. It is difficult to see any "jurisdictional" dimension to this issue, but, however denominated, it is clear that the Court of Appeals handled the issue properly.

a. In the district court, Respondents moved for summary judgment dismissing all claims arising prior to the four-year limitations period. After the completion of extensive discovery, the district court held that a "self-concealing" conspiracy suffices to toll the statute of limitations; that even if affirmative acts of concealment were required, there had been such acts; and that there were genuine issues of fact that prevented it from finding that Petitioners' knowledge of the railroads' actions, and active consideration of suit many years before actually bringing suit, warranted the entry of summary judgment.¹⁹ The district court denied Respondents' motion for summary judgment and certified its order to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). This was precisely what § 1292(b) requires:

When a district judge, in making in a civil action an *order* not otherwise appealable under this section, shall be of the opinion that such *order involves* a controlling question of law . . . and that an immediate appeal from the *order* may materially advance the ultimate termination of the litigation, he shall so state in writing in such *order*. The Court of Appeals which would have jurisdiction of an ap-

¹⁹ Because statute of limitations/fraudulent concealment was an important threshold issue, the district court ordered discovery focused on knowledge and concealment issues, during which over 60 depositions were completed. Only after the conclusion of that discovery were summary judgment motions filed.

peal . . . may . . . permit an appeal to be taken from such order

28 U.S.C. § 1292(b) (1982) (emphasis added).²⁰

Petitioners challenge the Court of Appeals' "jurisdiction" on the contentions that "there was no 'controlling' legal issue on fraudulent concealment [and] the court of appeals' *de novo* resolution of that issue did nothing to 'materially advance the ultimate termination' of this protracted litigation." Pet. at 22. The answer to their first point, quite simply, is that the question whether the district court erred in declining to grant summary judgment is an issue of law. The question whether there are material factual issues of record that preclude the grant of summary judgment is also a question of law.²¹ Indeed, beyond the obvious fact that these ultimate determinations are themselves legal issues, the district court's order "involved" (in the words of § 1292(b)) other legal issues, theretofore unsettled in the Sixth Circuit, concerning the kinds of actions that would amount to fraudulent concealment—issues that the Court of Appeals treated and clarified at length in its opinion, rejecting the district court's view that a self-concealing conspiracy

²⁰ It is orders, not issues, that are certified under 28 U.S.C. § 1292(b). *United States v. Stanley*, 107 S. Ct. 3054, 3060 (1987) ("the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (because the statute brings the 'order', not the question, before the court)"). See also *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 246 (7th Cir. 1981) (under Section 1292(b), "all questions material to the order are properly before the court of appeals"). For this reason, Petitioners' repeated reference to the uncertainty over what particular questions had been certified (Pet. at 19-20) is of no consequence.

²¹ As the Supreme Court has repeatedly recognized in recent decisions, Rule 56 requires the grant of summary judgment where there are no material factual disputes such that "the moving party is entitled to judgment as a matter of law." See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). See also C. Wright, *The Law of Federal Courts* 663-64 (1983).

is sufficient, but upholding the district court's finding that there was enough in the record to allow a jury to find that there was actual concealment. *See* Pet. App. at 39a-52a, 64a. In finding that Petitioners' clear knowledge of the railroads' actions, and in Pinney's case consideration of an antitrust action twelve years before actually commencing this suit, precluded tolling the statute under the separate knowledge and due diligence standards, the court was also deciding an issue of law that was unquestionably dispositive and that certainly was "involved" in the district court's "order."

Petitioners argue—remarkably, we think—that the court's disposition of the issue did not materially advance the case. They say that the disposition of

fraudulent concealment did absolutely nothing to advance the litigation because the court simultaneously held that Ohio's Valentine Act, providing that "no statute of limitations" would bar an action under state law was not preempted Since the same facts form the basis for the state and federal causes of action, the court's foraging through the facts on fraudulent concealment was a pointless abuse of Section 1292 (b) jurisdiction.

Pet. at 22. Not only is their position based on the surprising suggestion that eliminating a federal antitrust claim is insignificant, but it presupposes a prescience with respect to the outcome of the court's review that the interlocutory appeal statute does not expect or require. The determination of what questions "*may* materially advance the ultimate termination of the litigation" is made at the time the order is certified. The fact that one of several questions contained in certified orders ultimately does not shorten the trial as much as originally anticipated is irrelevant.²²

²² Indeed, Petitioners' arguments in this respect are disingenuous. At the time these orders were certified for interlocutory review, the district court had held that the Valentine Act's perpetual limitations

Finally, Petitioners thoroughly misstate the Court of Appeals' holding in an effort to show that the Court of Appeals "usurped the role of the factfinder." Pet. at 23. Petitioners say:

Although concluding that the record "may contain the seeds of support for the finding of the district judge that a factual question of actual concealment was presented"—a perception that, under the correct standard of review, requires affirmance—the court of appeals simply reached a different factual conclusion.

Pet. at 23. The Court of Appeals did no such thing. What the Court of Appeals found "seeds of support" for was the district judge's view that a triable issue existed as to one element of the fraudulent concealment doctrine—the issue of actual concealment by Respondents. But this was not the dispositive issue. Rather, the question of concealment was irrelevant in light of the fact that both Petitioners possessed sufficient information to have pursued their claims much sooner, and consciously elected to sit on their rights: As to Petitioner Pinney, the court held that "the time eventually arrived when 'the alleged conspiracy was no longer concealed and could have been discovered by due diligence well within the statutory period for bringing suit.'" Pet. App. at 64a. The court reached the same conclusion with respect to Litton: "[E]ven if the defendants might conceivably have misled Litton initially, *no reasonable person* in the position of Litton could have long relied on such impressions nor have been dissuaded from exercising due dili-

period *was* preempted. In light of that ruling, the Court of Appeals' determination of the federal statute of limitations issue plainly would have furthered the litigation, for it would have precluded proof involving 21 years of the alleged 25-year conspiracy. The only reason that the Court of Appeals' determination on the federal statute of limitations issue was not dispositive of a potentially broader trial is that these very Petitioners sought and obtained interlocutory review and reversal of the Valentine Act issue that they now claim rendered the Court of Appeals' actions improper.

gence in investigating possible antitrust liability within the statutory period.” *Id.* at 70a (emphasis added). Thus, the decision below was fully consistent with court’s role on interlocutory appeal.²³

In short, there was nothing extraordinary or unusual about the way in which the Court of Appeals addressed the statute of limitations issue.

b. The other part of Petitioners’ question is their complaint that the Court of Appeals erred in reaching the issue of Litton’s standing to bring its rate challenge, which had not been briefed or decided in the district court. Respondents had initially suggested in their appeal brief that it was proper for the appellate court to decide such an issue of law, and Litton had responded both to the procedural suggestion and on the merits. Having considered the legal issue regarding Petitioner Pinney’s standing to sue, the Court of Appeals realized that the legal issue was, as a practical matter, fully dispositive of the issue of Litton’s standing as well. Pet. App. at 32a-37a.

Indeed, there is no practical difference between the Court of Appeals simply holding that Litton’s claim was barred on the analysis of standing principles found applicable to Pinney and remanding to the district court, which would then have had to dismiss those claims on the basis of the same analysis. Moreover, the same result—dismissal of Litton’s rate claims—was independently required by statutory immunity and application of

²³ Petitioners complain that the court somehow ignored the appellate “abuse of discretion” standard (Pet. at 23) even though, in reaching its conclusion, the court clearly referred to precisely that standard. Pet. App. at 52a-53a. Their further chiding of the decision below as holding that knowledge of unilateral action is sufficient to toll the statute, and their reliance on cases to the contrary (Pet. at 22 n.18), are irrelevant here, where the Court of Appeals plainly found that Petitioners had actual knowledge of collective activity as well. Pet. App. at 58a-59a, 64a-65a.

Keogh. Thus, the error that Petitioners identify—if error there is—was meaningless as a matter of fact, and already addressed and settled as a matter of law by this Court's recent decision in *Stanley*. This is certainly not the kind of issue, without either practical or legal effect, that this Court should consider as an appropriate basis for granting *certiorari*.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 10, 1988

APPENDIX A

Pursuant to Supreme Court Rule 28.1, Respondents provide the following information:

1. Respondent CSX Corporation has the following non-wholly-owned subsidiaries and affiliates: Country Wide Transport Services, Inc.; Baronial Transportation Corporation; Akron and Barberton Belt Railroad Company (The); Akron Union Passenger Depot Company (The); Allegheny and Western Railway Company; Wesjax Development Company; Augusta and Summerville Railroad Company; Baltimore and Philadelphia Railroad Company (The); Beaver Street Tower Company; Belt Railway Company of Chicago; Central Florida Pipeline Corporation; Central Railroad Company of South Carolina (The); Central Transfer Railway and Storage Company; Chatham Terminal Company; Chicago and Western Indiana Railroad Company; Clearfield and Mahoning Railway Company; Cleveland Terminal & Valley Railroad Company (The); CSX Services, Inc.; Dayton and Michigan Railroad Company; Dayton and Union Railroad Company; Delaware and Bound Brook Railroad Company; First Georgia Development Corporation; Home Avenue Railroad Company (The); Lakefront Dock and Railroad Terminal Company (The); Monongahela Railway Company (The); Norfolk and Portsmouth Belt Line Railroad Company; North Charleston Terminal Company; Paducah & Illinois Railroad Company; Richmond-Washington Company; RF&P Corporation; Terminal Railroad Association of St. Louis; Trailer Train Company; Baltimore and Cumberland Valley Rail Road Extension Company (The); Winston-Salem Southbound Railway Company; Woodstock & Blocton Railway Company; Energy Dominion; Gemetal Distribution Services Company; Yukon Pacific Corporation; Green's Creek Joint Venture; High Island Offshore System; Norbritex Joint Venture; Poles Limited; Lanai Resort Partners;

James Center Development Company; Mid Allegheny Corporation; Staten Island-Cranford, Inc.; Glebe Road Associates; Glebe Road II Associates; Glebe Road III Associates; Glenway Associates; Richmond Center Associates; St. George Seaport Associates; and LightNet.

2. The Bessemer and Lake Erie Railroad Company is wholly-owned (except for directors' qualifying shares) by USX Corporation, with no subsidiaries of its own. Non-wholly-owned subsidiaries and affiliates of USX Corporation are: ACE Holdings, Ltd.; Adela Investment Company, S.A.; Altos Hornos de Vizcaya, S.A. (AHV); Associated Manganese Mines of South Africa, Ltd.; Associated Ore & Metal Corporation, Ltd.; Athione Prospecting & Development Corporation, Ltd.; Avateel SWA, Ltd.; Blue Grass Phosphate Company; Kapps Mining & Prospecting Co., Ltd.; La Pointe Iron Company; Navios Shipping Corp., Oresteel Investments (Proprietary), Ltd.; Prieska Copper Mines (Pty.) Ltd.; Société Des Mines De Fer De Guinée Pour L'Exploitation Des Monts Nimba (Mifergui Nimba); Tilden Iron Mining Company; The West Union Canal Company; U.S. Steel France; and Zuari Agro Chemicals Ltd.

3. Respondent Norfolk and Western Railway Company has the following non-wholly-owned subsidiaries: The Wabash Railroad Company and The Wheeling and Lake Erie Railway Company. Norfolk and Western is a wholly-owned subsidiary of Norfolk Southern Corporation. Norfolk Southern has the following non-wholly-owned subsidiary whose stock is publicly traded: Southern Railway Company. The Southern Railway Company has the following non-wholly-owned subsidiaries: High Point, Randleman, Asheboro and Southern Railroad Company; Mobile and Birmingham Railroad Company; The North Carolina Midland Railroad Company; The South Western Rail Road Company; State University Railroad Company; Yadkin Railroad Company.



MOTION FILED
AUG 10 1988

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No. 88-72

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

PINNEY DOCK & TRANSPORT CO.,
Petitioner,
v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

LITTON INDUSTRIES, INC., *et al.,*
Petitioners,
v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF
C.D. AMBROSIA TRUCKING CO.,
DAVID W. REANEY AND REANEY DOCK COMPANY,
AND ERIE-WESTERN PENNSYLVANIA
PORT AUTHORITY/CODAN CORPORATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI

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August 10, 1988

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DAVID W. REANEY AND REANEY DOCK COMPANY,
AND ERIE-WESTERN PENNSYLVANIA
PORT AUTHORITY/CODAN CORPORATION
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amici, David W. Reaney and Reaney Dock Company,
C.D. Ambrosia Trucking Co., Inc., and Erie-Western
Pennsylvania Port Authority/Codan Corporation, hereby

move for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari.*

Amici are two docks and a trucking company that were gravely injured by the same conspiracy challenged by the petitioners. *Amici* filed antitrust suits against the conspirators; two of *amici's* three suits were brought in district courts in the Sixth Circuit. Although *amici's* cases have been consolidated with several others for pretrial proceedings in a federal district court in the Third Circuit, there is a possibility that the Sixth Circuit's decision could control the two suits initially filed in the Sixth Circuit. Also, the Sixth Circuit's decision could conceivably receive precedential effect regardless of where suit was filed. *Amici* thus have a vital interest in the outcome of this case.

Additionally, *amici's* participation in this case will aid the Court because *amici* will present matters that are essential to resolution of the petition for a writ of certiorari. A number of those matters have not been put before the Court by the petitioners or have been treated cursorily by them. The matters presented by *amici* show that the Sixth Circuit's decision conflicts with decisions of this Court and federal courts of appeal, thwarts the explicit intent of Congress, and presents legal and economic questions of national importance.

Because *amici* have a vital interest in the outcome of this case and will present matters of great importance to certiorari, including matters not presented or not presented fully by the petitioners, it would be appropriate for *amici* to be permitted to file the accompanying brief in support of the petition for a writ of certiorari.

* The Pinney and Litton plaintiff-petitioners have consented to the filing of *amici's* brief in support of certiorari. Their letter of consent has been forwarded to the Clerk. The defendant-respondents have refused to consent to the filing of *amici's* brief, thereby making this motion necessary.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the motion to file the accompanying brief in support of the petition for a writ of certiorari.

Respectfully submitted,

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OCTOBER TERM, 1988

No. 88-72

PINNEY DOCK & TRANSPORT Co.,
v. *Petitioner,*

NORFOLK & WESTERN RAILWAY Co., *et al.*

LITTON INDUSTRIES, INC., *et al.,*
v. *Petitioners,*

NORFOLK & WESTERN RAILWAY Co., *et al.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF C.D. AMBROSIA TRUCKING COMPANY, INC.,
DAVID W. REANEY AND REANEY DOCK COMPANY,
AND ERIE-WESTERN PENNSYLVANIA
PORT AUTHORITY/CODAN CORPORATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICI

Amici are two docks and a trucking company that were gravely injured by the same conspiracy challenged by the petitioners in this case. *Amici* filed three antitrust suits against the conspirators, and two of those suits were

brought in district courts in the Sixth Circuit. Although *amici's* cases are presently pending in a federal district court in the Third Circuit, having been consolidated with several others for pretrial proceedings, there is a possibility that the Sixth Circuit's decision in this case could control *amici's* two suits initially filed in the Sixth Circuit. Also, the Sixth Circuit's decision could conceivably receive precedential effect in *amici's* cases regardless of where they were filed. *Amici* thus have a vital interest in this case.

INTRODUCTION

This case deals with the handling and transportation of iron ore that moved from Lake Erie to steel mills located in Ohio, Pennsylvania and West Virginia. Control over iron ore movements lay in the hands of a group of railroad companies, some of which are respondents in this case. In order to retain their control over iron ore handling and transportation, these railroads engaged in one of the most destructive conspiracies ever uncovered in the history of the antitrust laws. To protect their outmoded methods for handling and transporting iron ore from Lake Erie, for over twenty years this group of powerful railroads conspired to prevent the introduction of better and cheaper methods of handling and carrying ore. The conspirators thereby caused the cost of handling and transporting ore to be inflated by hundreds of millions of dollars and destroyed the economic health of persons and companies that sought to introduce modern technology. The conspiracy was carried out through hundreds of secret meetings, phone calls, letters and memoranda. So blatant was the conspirators' disregard of antitrust laws that their actions were memorialized in thousands of pages of documents ultimately discovered in the defendants' files.

When the conspiracy was finally uncovered, four of the railroads pleaded *nolo contendere* to a criminal indictment. During the criminal proceedings, a federal dis-

trict judge and the Court of Appeals for the District of Columbia Circuit held the conspirators' actions were subject to the antitrust laws. Moreover, a document inadvertently produced during discovery revealed that Conrail's antitrust counsel told that company's Board of Directors that "The type of conduct [at issue]—that is a conspiracy to monopolize and to prevent independent market entry—has never been exempt from the antitrust laws by reason of ICC regulation." However, contrary to the rulings of the District of Columbia judges and the conclusions of Conrail's counsel, the Sixth Circuit has now held the conspiracy immune from any significant civil liability to the parties it gravely injured or destroyed.

In its opinion, the Sixth Circuit issued an immunity ruling directly contrary to the D.C. Circuit's prior holding, conceded that its ruling on the *Keogh* issue conflicts with other courts of appeal, misapplied this Court's decision in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), ignored this Court's ruling in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), and thwarted the explicit intent of Congress in the Reed-Bulwinkle Act, 49 U.S.C. § 10706.

In these circumstances this case warrants review. There are direct conflicts between the Sixth Circuit and other courts of appeal. The Sixth Circuit's opinion is inconsistent with rulings of this Court. The legal and economic questions are of national importance—to the antitrust laws, to competitive conditions and a sound economy, and to carrying out the will of Congress.

STATEMENT OF THE CASE

A. The Railroads' Conspiracy

Mud-like iron ore was long transported to Lake Erie railroad docks in vessels called bulkers. These boats were unloaded by huge cranes, called hulett. Each hulett

had a claw that dipped into bulkers to grab loads of ore, which were deposited on the dock or in rail cars. The ore then moved inland to steel mills via railroad "line hauls" that were exceptionally lucrative for the railroads.

In the 1950's, ore began to be shipped in pelletized rather than mud-like form. Pellet ore can be carried in technologically advanced boats which unload themselves by an internal conveyor belt and a boom that deposits the ore on the dock. Because they unload themselves, these "self unloaders" rendered unnecessary the expensive hulett cranes used by railroad docks to unload bulkers. Moreover, self unloaders could be received at non-railroad docks that did not have hulett cranes. Because the non-railroad docks (called private docks) did not need to invest in huletts, they could charge much less than railroad docks.

The railroads viewed self unloaders and private docks as a serious threat. Self unloaders and private docks endangered the railroads' monopoly over the business of providing dock services for ore, and thereby threatend the revenues the railroads received from this business and the value of the railroads' investments in hulett cranes. They also endangered the railroads' monopoly over inland transportation of ore and the huge revenues derived from that transportation. For if self unloaders brought ore to private docks, then trucks, which were refused access by the railroads to railroad-owned docks, would be able to compete with railroads for the inland transportation of ore by carrying it from private docks.

The railroads therefore agreed to forestall the use of self unloaders and to preclude private docks and trucks from entering the iron ore trade. Beginning in 1956, and continuing for approximately twenty-four years, the railroads conspired to achieve their exclusionary purposes. The steps taken to implement the conspiracy included:

(1) Railroads refused to file "commodity" line haul rates for movements of ore from private docks. Ore unloaded at private docks thus could be moved inland by rail only at "class" rates, which were two to four times higher than the commodity line haul rates applicable to ore movements from railroad docks. In fact, no ore was ever moved at the expensive "class" rates because, as the railroads knew, it was economically infeasible to do so. Being denied commodity rates and commodity rate service, private docks were effectively precluded from competing with railroad docks.

(2) Despite economic savings realized because self unloaders unloaded themselves instead of having to be unloaded by hulett cranes, the railroads refused to lower their dock handling rates for self unloaders.

(3) Railroad docks refused to handle self unloaders.

(4) Railroads refused to sell or lease land to companies or governmental entities that intended to establish private docks.

(5) Railroads prohibited trucks from picking up ore at railroad docks, or levied economically prohibitive charges against such pick-ups.

(6) Railroads harassed truck movements of ore.

(7) When any railroad indicated it might abandon the conspiracy and act independently by handling self unloaders, by granting a commodity line haul rate to a private dock, or by leasing or selling land for a private dock, other railroads pressured it to adhere to the conspiratorial agreements and threatened retaliation if it acted independently. The other railroads thereby forced continued adherence to the conspiracy.

The railroads' conspiratorial purposes and agreements were kept secret by use of "informal" unpublicized meet-

ings, unpublished proposals, private phone calls, and private memoranda and letters that sometimes carried specific admonitions of secrecy. By these secret means the railroads agreed upon the conspiracy's goals of forestalling self unloaders and barring private docks and trucks. By the same secret means the railroads decided to take such implementing steps as agreeing not to grant a commodity line haul rate to private docks, agreeing not to sell or lease land for use as a private dock, agreeing not to grant lower dock handling rates to self unloaders, agreeing to harass truck movements of ore, and applying pressure and threatening economic retaliation against any railroad that indicated it might abandon the conspiracy.

B. Proceedings In the Instant Case And the Criminal Case

Because of a falling out between two of the conspirators, the conspiracy was uncovered in 1980. The instant civil cases were then brought, thousands of pages of incriminating documents were obtained from the defendants' own files, and the trial judge wrote lengthy opinions detailing the facts and finding the defendants subject to the antitrust laws. In addition, a criminal indictment was filed by the federal government. The senior trial judge in that case ruled the defendants' actions were not immune from the antitrust laws, and the Court of Appeals for the D.C. Circuit affirmed. Four defendants, three of which are respondents in this case, pleaded *nolo contendere* rather than face trial.¹

¹ The four were Conrail, the Baltimore & Ohio Railroad, the Chesapeake & Ohio Railroad, and the Bessemer & Lake Erie Railroad. One defendant, the Norfolk & Western, went to trial and obtained a directed verdict of acquittal because the trial judge felt the government failed to show it had joined the conspiracy. The trial judge in the *Pinney* case thereafter reached an opposite assessment of the evidence against the Norfolk & Western, and the question is *sub judice* in consolidated actions being heard in Philadelphia.

REASONS FOR GRANTING THE WRIT

I. By Immunizing The Conspirators' Denial of Commodity Line Haul Rates to Private Docks, The Sixth Circuit Has Acted In Conflict With the D.C. Circuit and Has Contravened Clear Congressional Intent

The most important method used to exclude private docks from handling ore was the defendants' refusal to grant them commodity line haul rates. The Sixth Circuit, however, has held the exclusionary denial of rates immune from the antitrust laws, and has thereby relieved defendants from most of their civil damages liability to private docks.

The Sixth Circuit's immunity ruling directly conflicts with the decision of the District of Columbia Circuit in the criminal case. *United States v. Bessemer & Lake Erie Railroad Co.*, 717 F.2d 593 (D.C. Cir. 1983). There the indictment listed nine categories of acts in furtherance of the conspiracy. 717 F.2d at 597. Three of the nine categories involved denial of commodity line haul rates to private docks,² and the indictment was upheld in its entirety by the D.C. Circuit. Thus the D.C. Circuit has held the conspiratorial denial of line haul rates subject to antitrust liability, while the Sixth Circuit has held the denial immune from antitrust liability.³

² The three categories of such denial were that the defendants refused to grant commodity line haul rates for movements of ore from private docks, removed private docks from tariffs providing commodity line haul rates on ore, and amended commodity line haul tariffs to provide that they applied only from railroad docks.

³ The Sixth Circuit unsuccessfully tried to distinguish the D.C. Circuit opinion, saying "We do not find our holdings necessarily at odds with those in *U.S. v. Bessemer* involving entirely different considerations of the role of the United States in the criminal enforcement of the Sherman Act." Petitioners' Appendix at 28a-29a, n.15. However, any such "different considerations of the role of the United States in criminal enforcement" have nothing to do with whether the conspiratorial denial of a line haul rate is immune

The Sixth Circuit's decision also conflicts with this Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). There the Court ruled that, even if an act is lawful when committed in isolation, it is not lawful when committed as part of a broader scheme: "[A]cts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." 370 U.S. at 707. Here the denial of commodity line haul rates to private docks was one of several means used to implement a broader overall conspiracy to bar private docks, trucks and self unloaders. Even assuming the denial of rates would be lawful standing alone, it was unlawful as part of defendants' overall scheme.⁴

The Sixth Circuit's ruling also contravenes the will of Congress in two ways the Circuit did not even discuss. First, when enacting the Reed-Bulwinkle Act, 49 U.S.C. § 10706, Congress explicitly made clear that agreements limiting service were not to be immune from the antitrust laws. Representative Bulwinkle said:

the Act would not make possible carrier agreements to limit and reduce service to the public. S. 110 as originally introduced and as passed by the Senate authorized the approval of agreements as to matters of service. Objection was made to such agreements 94 Cong. Rec. 4033 (1948) (extension of remarks). (Emphasis added.)

To obtain passage of the Act, said Bulwinkle, its supporters

proposed that the bill be amended so as to restrict its application to rate conferences and nothing else.

from antitrust laws. If the denial of rates is immune, it is immune regardless of whether a case is criminal or civil, and if it is not immune, it lacks immunity regardless of whether a case is criminal or civil.

⁴ The Sixth Circuit did not mention *Continental Ore*.

This having been done by amendment in the House, subsequently accepted by the Senate, the *bill no longer applies to agreements as to service matters*, . . . 94 Cong. Rec. 4033 (1948) (extension of remarks). (Emphasis added.)

The lack of immunity for agreements to limit service is fatal to the conspiracy, for there could be no commodity line haul *service* without commodity line haul *rates*. By agreeing to deny commodity line haul *rates* to private docks, the defendants were agreeing to deny them commodity line haul *service*. Such denial of service is not immune under Reed-Bulwinkle.

Furthermore, because the defendants knew that no ore ever moved via the much higher priced class rate service, by denying *commodity* rates and service to private docks the defendants were *de facto* denying them *any* service. Again, such denial is not immune.

Second, the Sixth Circuit thwarted Congress' intent that there be no agreements limiting a railroad's right of independent action and Congress' intent that no railroad coerce another into agreeing not to exercise its right of independent action. The Congressional intent was explicitly stated in the Reed-Bulwinkle Act itself⁵ and in its legislative history.⁶

⁵ The Commission "may not approve an agreement . . . establishing a procedure for determination of a matter through joint consideration unless that Commission finds that each party to the agreement has the absolute right under it to take independent action either before or after a determination is made under that procedure." 49 U.S.C. § 10706(d)(2).

⁶ The Senate Report says the House bill was changed "to make it unmistakably clear that no agreement between carriers establishing a procedure for the determination of any matter through joint consideration shall be approved unless assurance is provided that each carrier party to the agreement shall have the free and unre-

Here the railroads' secret agreements contained no provisions according any right of independent action. Rather, the railroads agreed that no carrier would act independently, and they brought economic pressure to bear on any railroad that considered granting a commodity line haul rate to a private dock. None of this was even mentioned by the Sixth Circuit.

II. The Sixth Circuit's Ruling On *Keogh* Concededly Conflicts With Decisions of Other Circuits and Is Inconsistent With This Court's Decision in *Square D*

The Sixth Circuit ruled that the *Keogh* doctrine bars suits not just by shippers, but by competitors. The Circuit conceded that this ruling is contrary to other circuits. Petitioners' Appendix at 17a.

The Sixth Circuit also seriously misapplied this Court's recent decision in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), which the appeals court relied upon. In *Square D*, the present *amici*

strained right to take independent action." Senate Report No. 44, p. 15, 80th Cong., 2d Sess. (1948).

Representative Bulwinkle made clear that the right of independent action must be preserved against coercion. He said:

The charge made against the railroads in the *Georgia* case is that they combined and conspired to fix rates by coercion. . . . A combination or conspiracy of that kind would not be protected or immunized by S.110.

S.110 does not authorize the Interstate Commerce Commission to approve rate conferences that are used in a conspiracy to fix rates by coercion. . . .

There is nothing in the bill which would prevent issuance of an injunction against coercion . . . whether accomplished by a rate bureau or by any other means. 94 Cong. Rec. 4033-4034 (1948) (extension of remarks); see 94 Cong. Rec. 4032 (1948) (extension of remarks).

Senator Reed similarly emphasized that:

This bill does not give any immunity to any coercive combination. Paragraph 6 leaves such a combination subject to the antitrust laws, just as it is today. 93 Cong. Rec. 6614 (1947).

submitted a brief pointing out that *Keogh* had never applied to suits by competitors even though "bottleneck monopolists" had often tried to use it to bar actions by competitors who had been foreclosed from introducing cheaper and better products and services. The *amici* urged that, if the Court reaffirmed *Keogh*, it should not apply *Keogh* to competitors. And, in a brief authored by counsel for the Chessie system in this case, the *Square D* defendants candidly acknowledged that "courts have viewed competitor cases as distinctly different" from shipper cases.

With this information before it, the *Square D* Court said not less than twelve times that *Keogh* bars suits by shippers,⁷ but never even *hinted* that *Keogh* bars suits by competitors.

Furthermore, the Court reaffirmed the application of *Keogh* to shippers not because the doctrine was wise, but because it was a long standing part of the "settled legal context" in which Congress had legislated. Congress, said the Court, had long known of but had not changed *Keogh*. 476 U.S. at 423.

Application of *Keogh* to competitors has *not* been part of any settled legal context known to but not changed by Congress. Rather, until the Sixth Circuit's opinion, *all* the law was that *Keogh* did *not* apply to competitors.⁸

⁷ In addition, the Court quoted language from *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), stating that *Keogh* applies to suits by shippers.

⁸ In support of its *Keogh* ruling the Sixth Circuit urged that the ICC is the sole source of rights for competitors. That argument is remarkably mistaken. As Congress made clear when enacting the Reed-Bulwinkle Act, competitors have rights under the Sherman Act when railroads act outside the immunity granted by Reed-Bulwinkle. In addition this Court and others have ruled that competitors have rights and remedies under the Sherman Act even though they may also have ICC rights and remedies. See *Square D*, *supra*, 476 U.S. at 419-20; *ICC v. American Trucking Associates, Inc.*, 467 U.S. 354, 360 (1984).

That was the settled legal context which Congress long knew of but did not change in regard to application of *Keogh* to competitors.⁹

III. The Sixth Circuit's Decision on Standing Is Unprecedented And Contrary To Decisions of This Court

The chain of transportation for iron ore is interlinked. The defendants thus knew that, if they could destroy competition at one of the links, they would *ipso facto* destroy it at the others. If they could keep out self unloaders, they could keep out private docks because the latter lacked hulett cranes necessary to unload bulkers. Conversely, if they could keep out private docks, they could keep out self unloaders because the latter would have no place to deliver ore. And if they could keep out private docks, they could keep out trucks because the latter were not permitted to pick up ore at railroad docks.

Knowing the interlinked character of the transportation chain, the defendants launched an integrated overall conspiracy directed at *all* the links in order to be sure of totally thwarting all dock and truck competition. Yet the Sixth Circuit ruled that for purposes of standing the conspiracy must be compartmentalized, so that each plaintiff has standing to attack only some of the conspiracy's actions. For example, according to the Sixth Circuit, a dock plaintiff can attack a denial of line haul rates but not the railroads' refusal to handle self-unloaders.

The Sixth Circuit's ruling is remarkable. As far as *amici* are aware, it is the first time any federal appellate

⁹ This is a monopolization and boycott case, not a rate case. But even if it were a rate case, the Sixth Circuit also carried *Keogh* into a situation rarely involved in cases where that doctrine is raised. In the usual *Keogh* case one does not know what the applicable rate would have been if the rate complained of is ruled illegal. But here the rate that would have been applicable is known with exactitude: it is the same commodity line haul rate that was in effect from every one of the defendants' own docks and that was put into effect from petitioner Pinney's dock when the conspiracy partially broke down in 1978.

court has held that injured competitors (who were the announced targets of a conspiracy and often were named in conspiracy meetings and documents) lack antitrust standing to base a suit on all the components of the conspiracy. The Sixth Circuit's ruling also flies in the face of this Court's holding in *Continental Ore* that a plaintiff cannot be forced to attack only parts of a conspiracy:

[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.' *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). (Emphasis added.)

The Sixth Circuit's decision also conflicts with this Court's ruling in *Blue Shield of Virginia, Inc. v. McCready*, 457 U.S. 465 (1982). There a conspiracy to bar psychologists from insurance reimbursement caused injury to a consumer of psychological services. The consumer was held to have standing because her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." 457 U.S. at 484.

Here actions against self unloaders caused injury to private docks and trucking companies; actions against private docks caused injury to trucking companies; and the injury to each group "was inextricably intertwined with the injury the conspirators sought to inflict" on other groups. Yet the Sixth Circuit has said that no group has standing to assail intertwined actions that were taken against another group but that also harmed the first group. This holding conflicts with *McCready*.

IV. The Sixth Circuit's Decision Nullifies Congress' Intent That the Ratemaking Process Be Open to Public Participation

The defendants' conspiracy was hatched and maintained in secret. Public notice was not given of proposed agreements or of meetings to discuss them. Decisions were reached at secret "informal meetings." Admonitions of confidentiality were issued. The defendants' agreements were never published. Shippers and competitors received no opportunity to comment. The secrecy and lack of notice attending the conspiracy were charged by the government in the criminal case and were set forth in an opinion by the trial judge in this case.

The secrecy and lack of notice were inconsistent with prerequisites for immunity established by Congress. The legislative history of the Reed-Bulwinkle Act makes explicit that a ratemaking process open to participation by the public was a Congressionally ordained condition of immunity.¹⁰

¹⁰ Representative Bulwinkle said:

I read the other day the astonishing statement that 'the bill permitted carriers to get together in secret some dark night.' Needless to say this is absolutely incorrect. *The bill provides for complete publicity at every conference to protect the rights of the public.* 93 Cong. Rec. 3969 (1947) (extension of remarks). (Emphasis added.)

The Senate and House Reports also show Congress' view that rate bureaus must give all interested parties "a full opportunity to be heard" in regard to rate adjustments. Senate Report No. 44, p. 11 (1948); House Report No. 1100, pp. 9-10 (1948). The Reports add that "one of the principal functions" of the rate bureaus "is to serve as media through which the railroads confer with their shippers and consult their wishes and needs before reaching their determinations with respect to rates. . . ."

Ibid.

Finally, Representative Bulwinkle pointed out that the conference method of ratemaking permitted by the bill "furnish[es] a method by which any shipper, small as well as large, can keep track of proposed changes through regularly published dockets listing all

The Sixth Circuit, however, immunized the conspirators from significant liability to injured parties despite the conspiracy's total inconsistency with Congress' requirement of a ratemaking process open to public participation. The Circuit thereby thwarted Congress' intent that an open process be a precondition of immunity.¹¹

V. The Sixth Circuit's Opinion Is Inconsistent With Decisions of This Court and Courts of Appeal Regarding The Use of Bottleneck Monopoly Power

The railroads had bottleneck monopoly power at two different levels. They had a monopoly over the business of providing dock services for ore, and monopolies over the business of transporting ore inland to steel mills. This dual bottleneck monopoly was used to prevent market entry at three levels: to forestall self unloaders from carrying ore; to preclude private docks from handling ore; and to preclude trucks from carrying ore inland. The railroads thus used their bottleneck monopolies to stifle technological progress and cheaper prices at three levels and to prevent competition with themselves at the dock and inland transport levels.

The use of bottleneck monopoly power at one or more levels of an industry to bar competition, technological progress and cheaper prices at other levels has become a

proposals." 94 Cong. Rec. 4033 (1948) (extension of remarks). He also said the conference method of ratemaking provides "a place where any shipper . . . may present his views on proposed changes to all interested carriers." *Id.* at 4033. He and Senator O'Mahoney stressed that small shippers would be at a particular disadvantage in the absence of these procedures. *Id.* at 4033; see 94 Cong. Rec. 8414-15 (1948).

¹¹ The Circuit's proffered justification for thwarting Congress was its statement that Pinney and Litton had waived claims that defendants had not adhered to open procedures. Petitioners' Appendix at 28a. Even if the Circuit's statement regarding waiver is factually accurate, this cannot excuse a federal court from ignoring the explicit intent of Congress.

frequent occurrence in crucial regulated industries such as the telephone, electric power and railroad industries.¹² When such use of bottleneck power has been challenged in antitrust cases, this Court and courts of appeal have regularly made plain that there is neither regulatory immunity nor *Keogh* protection for the use of bottleneck power at one level to bar competition at another level. See, e.g., *Otter Tail*, *supra*; *Clipper Express*, *supra*; *City of Kirkland*, *supra*; *City of Groton*, *supra*; *Essential Communications*, *supra*.

In the present case, however, the Sixth Circuit has granted both regulatory immunity and *Keogh* protection to bottleneck monopoly actions by which conspirators used a stranglehold over one level of an industry to obtain an equal stranglehold over a second level, with corresponding stifling of competition, lessening of technological innovation, and higher prices. In so acting the Sixth Circuit has come squarely into conflict, on questions of national economic importance, with the above cited decisions of this Court and courts of appeal.

¹² See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Litton Systems, Inc. v. AT&T*, 487 F. Supp. 942 (S.D.N.Y. 1980), *aff'd* 700 F.2d 785 (2d Cir.), *cert. denied* 464 U.S. 1073 (1983); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied* 459 U.S. 1170 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114 (3d Cir. 1979); *Frontier Enterprises, Inc. v. Amador Stage Lines*, Civil No. S-83-940 MLS (E.D. Cal., October 2, 1985); *Trans-Kentucky Transportation Railroad v. Louisville and Nashville Railroad Co.*, 1983-2 Trade Cases ¶ 65, 476 (E.D. Ky. 1983); *United States v. AT&T*, 461 F. Supp. 1314 (D.D.C. 1978); *Marnell v. United Parcel Service of America*, 260 F. Supp. 391 (N.D. Cal. 1966).

CONCLUSION

For the above reasons, this Court should grant certiorari.¹³

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¹³ Review is warranted even if the Sixth Circuit was correct in ruling that, because petitioners in this case allegedly knew of the conspiracy, the doctrine of fraudulent concealment is inapplicable to them and the federal statute of limitations bars them from recovering under the federal antitrust laws. The Ohio antitrust statute provides that there shall be *no* statute of limitations under the state antitrust laws, and there would therefore be no bar to recovery of double damages under the state laws by petitioners if the Sixth Circuit was wrong in ruling that the defendants' actions are immune under paramount federal regulatory law. In any event, the evidence shows that the *amici* had no knowledge of the conspiracy, which was fraudulently concealed from them. *Amici's* actions, therefore, are not barred by the statute of limitations.

(5)
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Supreme Court, U.S.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

REPLY MEMORANDUM FOR PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-72

PINNEY DOCK & TRANSPORT CO., PETITIONER

v.

NORFOLK & WESTERN RAILWAY CO., ET AL.

LITTON INDUSTRIES, INC., ET AL., PETITIONERS

v.

NORFOLK & WESTERN RAILWAY CO., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

REPLY MEMORANDUM FOR PETITIONERS

Bereft of any valid or principled basis for opposing certiorari, respondents' principal arguments rely on: (1) mischaracterizations of the claims in this case; and (2) mischaracterizations of the decisions in other cases.

1. A pervasive theme of respondents' submission is their studied avoidance of the fact that "the heart of [petitioners'] claim . . . is the alleged conspiracy itself" — a con-

spiracy "to boycott and eliminate a direct competitor so as to monopolize a market" (Pet. App. 120a, 91a). Respondents ignore the actual claims in this case in favor of claims they think more neatly fit possible defenses. The unbridged chasm between respondents' arguments and the actual record in this case is evident from respondents' discussion of the statutory immunity and *Keogh* issues, which fails to acknowledge that the complaints in this case allege a conspiracy to monopolize that includes conduct beyond the scope of proper rate bureau activity.

Contrary to respondents' mischaracterization (Br. in Opp. 2), echoed by the court of appeals (Pet. App. 75a-76a), there are no "rate" and "non-rate" claims in this case. The only claim is a claim of conspiracy. Similarly, there is no challenge in this case to any filed rate as a measure for awarding damages. Petitioners are not shippers seeking damages equal to the differential between the filed rate and some hypothetical rate; petitioners sought to compete with respondents and seek damages based solely on lost profits resulting from their exclusion from the market.

2. There is no merit to respondents' suggestion that the decision below can be reconciled with the decision of the District of Columbia Circuit in the related criminal case based on the same conspiratorial conduct (*United States v. Bessemer & L.E.R.R.*, 717 F.2d 593 (D.C. Cir. 1983)). Respondents engage in wishful thinking when they argue that the District of Columbia Circuit *might have* rested its decision only on what respondents mischaracterize as "non-rate" claims. But the District of Columbia Circuit expressly invoked broader grounds for its judgment. Correctly recognizing that the indictment charged a *conspiracy*, the court held that even rate-related acts that were taken in furtherance of the conspiracy were subject to antitrust scrutiny (*id.* at 600):

'Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition . . . , rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9).' [1]

The conflict could not be more plain. The District of Columbia Circuit upheld the imposition of criminal sanctions for the same conduct the court below held to be immune from civil liability.²

¹ Quoting *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960). See also 717 F.2d at 601 (specifically rejecting respondents' contention that their imposition of higher bulkier handling charges on self-unloaders was immune).

² Nor is there any merit to respondents' labored denial of a conflict among the circuits on the corollary question whether predatory motive will forfeit any statutory or implied antitrust immunity that might otherwise attach. On this question, the decision below (Pet. App. 23-24) conflicts with decisions of this Court and of other courts of appeals. See *United Mine Workers v. Pennington*, 381 U.S. 657, 661-69 (1965); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203, 211-12 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974); *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877, 887 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960). See also *United States v. Braniff Airways, Inc.*, 453 F. Supp. 724, 728-29 (W.D. Tex. 1978); *United States v. American Telephone & Telegraph Co.*, 461 F. Supp. 1314, 1328-29 (D.D.C. 1978); *BBD Transportation Co. v. U.S. Steel Corp.*, 1976-2 Trade Cas. (CCH) ¶ 61,079 (N.D. Cal. 1976); *United States v. Morgan Drive Away, Inc.*, 1974-1 Trade Cas. (CCH) ¶ 74,888 (D.D.C. 1974); *Marnell v. United Parcel Service of America, Inc.*, 260 F. Supp. 391, 403-04 (N.D. Cal. 1966); *Riss & Co. v. Ass'n of American Railroads*, 170 F. Supp. 354, 362 (D.D.C.), *cert. denied sub nom.*, *Atlantic Coastline Railroad Co. v. Riss & Co.*, 361 U.S. 804 (1959); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp.

This conflict on the proper scope of immunity from the antitrust laws touches on important and recurring questions in the vital transportation sector of the economy, and, indeed, for all regulated industries. There is, therefore, no validity to respondents' contention (Br. in Opp. 12) that the significance of a decision in this case would be blunted because the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, has been further amended.³

In fact, the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") and the Staggers Rail Act of 1980 preserve the limited antitrust immunity contained in the Reed-Bulwinkle Act. Neither the language nor the legislative histories of the Staggers and 4R Acts indicate that Congress intended to depart from the criteria tradi-

199, 207 (D.N.J. 1952), *appeal dismissed sub nom., American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953).

Nor is there any validity to respondents' misreading of *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). On the issue of statutory immunity, this Court held in *Pennington* that a statutory exemption from the antitrust laws is forfeited where, as here, otherwise exempt action is taken with an anticompetitive purpose and restrains "the freedom of economic units to act according to their own choice and discretion" *id.* at 668. In another portion of its opinion, dealing with constitutional immunity—hence, not relevant here—the Court made the comments on which respondents seize (Br. in Opp. 9, 10 n.10). As *Pennington* itself makes clear in its rejection of the same arguments respondents offer here, constitutional immunity is not co-extensive with statutory immunity.

³ A decision on the merits by this Court would have a profound impact on the eleven lawsuits against respondents for the same conduct that are pending in consolidated pretrial proceedings in the Eastern District of Pennsylvania (*see* Pet. 5 n.1). Those cases were originally filed in district courts in the Second, Third, Sixth and District of Columbia Circuits. In the absence of an authoritative decision by this Court, the conflicting views of the courts of appeals will plague the multidistrict cases.

tionally used to determine the scope and limits of railroad antitrust immunity.⁴ In any event, the existence of the Staggers and 4R Acts did not dissuade this Court from examining the legislative history of the Reed-Bulwinkle Act in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 418-19 (1986), and those statutes provide no basis for avoiding review here. If anything, Congress' move towards increased deregulation enhances the importance of confining the statutory immunity to its proper, limited scope.

3. Respondents prefer to ignore the plain fact, evident to the court below, that the decision in this case conflicts with holdings of the Second, Third, and Ninth Circuits. Those courts of appeals have expressly rejected efforts to

⁴ Although the 4R Act and Staggers Act have substantially reduced the role of rate bureaus in the formulation of rate determinations, the statutes do permit joint agreements in certain areas. While the Reed-Bulwinkle language has been changed, the same limited antitrust immunity applies to the surviving rate bureaus and joint agreements and, in particular, continues to apply with full force to motor carriers. See 49 U.S.C. § 10706(b)(2). Railroads and motor carriers must comply with the terms of such joint agreements and any conditions set by the ICC in order to enjoy antitrust immunity. See 49 U.S.C. § 10706(a)(2)(A) ("[i]f the Commission approves the agreement, it may be carried out *under its terms and under the conditions required by the Commission*, and the [antitrust laws] do not apply to parties and other persons *with respect to making or carrying out the agreement*.") (emphasis added). See also 49 U.S.C. §§ 10706(a)(4) & (b)(2). Furthermore, the right of independent action is explicitly preserved. See §§ 10706(b)(3)(B)(ii) & (d)(2)(c). The very pre-conditions for immunity survive the more recent legislation, and this Court's decision on Reed-Bulwinkle immunity clearly would inform the immunity analysis for future cases.

The legislative history of the Staggers Act also indicates that certain "procedural protections" were put into place for joint discussions so as to "insure that remedies for anti-competitive activities remain under existing laws." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 114 (1980).

expand *Keogh* to bar claims by competitors. In contrast, the Sixth Circuit is the first court of appeals ever to expand *Keogh* in this way.

The principal basis upon which respondents seek to blind this Court to the obvious conflict is the suggestion that *Keogh* is limited to the Interstate Commerce Act. Respondents contend, therefore, that the conflict that exists between the decision below and the decisions of the Second and Third Circuits is of no consequence because the latter cases did not arise under the Interstate Commerce Act. The federal courts have never accepted respondents' exceedingly narrow view of *Keogh*. *Keogh* has consistently been a guide to analysis in a broad array of regulatory regimes.⁵ It is too late in the day to accept respondents' contention that *Keogh* does not apply outside the context of the Interstate Commerce Act.

At all events, even within the universe of Interstate Commerce Act cases, *Keogh* has never before been the basis for barring claims by a competitor. Respondents' empty boast that there is "ample precedent in this Court" for applying *Keogh* to a competitor in the ICC context (Br. in Opp. at 16 n.16) is exposed by respondents' inability to cite a single case for that proposition.⁶ On the con-

⁵ See, e.g., *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309-10 (1963) (Civil Aeronautics Act); *United States v. RCA*, 358 U.S. 334, 347-48 (1959) (Federal Communications Act); *Far East Conference v. United States*, 342 U.S. 570, 574 (1951) (Shipping Act of 1916); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1178-79 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (Federal Power Act); *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314, 1317 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978) (Federal Power Act); *McCleneghan v. Union Stock Yards Co.*, 298 F.2d 659, 667 (8th Cir. 1962) (Packers and Stockyard Act).

⁶ Respondents again engage in wishful thinking when they suggest (Br. in Opp. 15 n.16) that in *Georgia v. Pennsylvania R.R.*, 324 U.S.

trary, this Court's precedents (*Keogh*, *Georgia*, and *Square D*) overwhelmingly show that *Keogh* has been used to preclude only *shippers'* antitrust claims.⁷

There is good reason why *Keogh* has never barred a competitor's claims: the rationale of *Keogh* is wholly inapplicable in these circumstances. This Court explained in *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. at 516, that *Keogh* poses no bar when "the damages caused by a conspiracy to monopolize [are] being measured not merely by the consequences flowing from the [rate] preference, but by those flowing from the conspiracy in all its comprehensive unity."⁸ The situation presaged by this

439 (1945), this Court *might have* dismissed damage claims brought by a competitor if only such claims had been asserted. The reality, of course, is that Georgia brought no damage claims as a competitor and this Court, therefore, could not and did not dismiss any such claims (see Pet. 16-17).

⁷ Finding no cases applying *Keogh* to a competitor, respondents cite cases barring a competitor's antitrust claim on grounds having nothing to do with *Keogh* (Br. in Opp. 15). See *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963) (district court was without power to suspend rates pending an ICC investigation, where a statutory provision required such rates to go into effect after a seven month period); *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936) (plaintiff was barred, not by *Keogh*, but by electing to pursue ICA remedies before the ICC, which had denied reparations on the merits). Respondents also cite *Seatrains Lines, Inc. v. Pennsylvania R.R.*, 207 F.2d 255 (3d Cir. 1953), a decision which does not even mention *Keogh*.

⁸ *Accord Delaware & H. Ry. v. Consolidated Rail Corp.*, 654 F. Supp. 1195, 1205 (N.D.N.Y. 1987); *TransKentucky Transp. R.R. v. Louisville & N.R.R. Co.*, 581 F. Supp. 759, 767 (E.D. Ky. 1983); *MCI Communications Corp. v. AT&T*, 462 F. Supp. 1072, 1100 (N.D. Ill. 1978), *aff'd in part and rev'd in part on other grounds*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Keith Ry. Equip. Co. v. Association of American Railroads*, 64 F. Supp. 917, 920 (N.D. Ill. 1946) (all rejecting the *Keogh* defense where rate conduct is part of a broader scheme to monopolize).

Court in *Terminal Warehouse* is present here. Petitioners' damages resulted from their exclusion from the iron ore transportation and handling market, not from their having paid a rate that they later claimed to be unlawful.

Keogh is further inapplicable to competitors because, while the ICC can award a shipper reparations for a discriminatory rate, the ICC has no authority to award to a competitor its lost profits caused by monopolization.⁹ That is the situation here and this Court should grant certiorari to review a decision that denies competitors the Sherman Act remedy Congress intended.

4. Respondents make no effort to defend the court of appeals' disposition of an issue—petitioner Litton's standing—over which that court had no jurisdiction. As is undisputed, the decision below conflicts with this Court's holding in *United States v. Stanley*, 107 S.Ct. 3054 (1987), that a court of appeals has no jurisdiction under 28 U.S.C. § 1292(b) to consider an issue that was not raised, considered or decided in the district court and was not contained in any order certified for interlocutory appeal.

Respondents offer only the arrogant suggestion that the court of appeals' plain usurpation of authority makes "no practical difference" and is "meaningless as a matter of fact" (Br. in Opp. 23-24). In contrast to respondents' cavalier attitude toward federal court jurisdiction, this Court correctly recognizes "the central principle of a free

⁹ The ICC's statutory authority to investigate complaints, and award damages, is limited to violations of the ICA—not antitrust violations. 49 U.S.C. §§ 11701 and 11705. See *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944) (the ICC "has no power to enforce the Sherman Act"). Accord *Marnell v. United Parcel Service of America, Inc.*, 260 F. Supp. 391, 404 (N.D. Cal. 1966); *Drum Transport, Inc. v. United States*, 298 F. Supp. 667, 670 (S.D. Ill. 1969); *Union Pacific-Control-Missouri Pacific: Western Pacific*, 366 I.C.C. 462, 485 (1982); *Central Yellow Pine Ass'n v. Illinois Central R.R.*, 10 I.C.C. 505, 541 (1905).

society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power.” *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 2268, 2271 (1988). See also *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 n.3 (1988) (“a litigant’s failure to clear a jurisdictional hurdle can never be ‘harmless’ or waived by a court”); *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887) (“the rule . . . is inflexible and without exception, which requires [a federal court] of its own motion, to deny its own jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record”).

Similarly, respondents muster no defense for the court of appeals’ further overstepping of the proper bounds of appellate review. The court below—on an interlocutory appeal and without even obtaining the record from the district court (see Pet. 24-25 n.23)—reversed the district court’s ruling that factual disputes precluded entry of summary judgment on the statute of limitations issue. Respondents can say no more than that the court of appeals “referred” to the correct abuse of discretion standard (Br. in Opp. 23 n.23). But after making this “reference,” the court of appeals expressly disavowed reliance on that standard, acknowledging that application of the abuse of discretion standard would have produced an entirely different result (see Pet. 23; Pet. App. 70a-71a).

In reaching out to decide some issues that were never certified and in deciding factual issues that are not proper subjects for interlocutory appeal,¹⁰ the court of appeals

¹⁰ See *Tidewater Oil Co. v. United States*, 409 U.S. 151, 165, 171-72 (1972) (Section 1292(b) “hardly created a general right of interlocutory appeal”; “questions that would be presented to the courts of appeals under § 1292(b) would often involve *threshold procedural issues not requiring extensive analysis of the record*”) (footnote omitted & emphasis added).

explicitly discarded accepted standards for review. The court of appeals exacerbated these errors and transgressed a fundamental limitation on appellate review when it engaged in precisely the conduct this Court criticized in *Amadeo v. Zant*, 108 S. Ct. 1771, 1777 (1988):

the Court of Appeals offered factual rather than legal grounds for its reversal of the District Court's order . . . [and] simply expressed disagreement and substituted its own factual findings for those of the District Court.

These usurpations of power should not be permitted to stand.

For the foregoing reasons and the reasons stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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